Media Law and Ethics

This comprehensive textbook provides a thoughtful introduction to both the legal and ethical considerations relevant to students pursuing careers in communication and media.

The fully revised, sixth edition continues to integrate fundamental legal and ethical principles with cases and examples from both landmark moments and recent history. It expands upon the previous edition's exploration of international and non-U.S. law, introduces a new chapter on digital and social media, and incorporates discussion of new technologies and media throughout its coverage of core topics such as privacy, intellectual property, defamation and commercial speech. Coverage of recent court cases and congressional hearings brings readers up to date on the evolving discussion surrounding Facebook, Twitter and today's other major online players.

This hybrid textbook is ideal for undergraduate and graduate courses in media and communication that combine law and ethics.

Online resources including chapter PowerPoint slides, study guides and sample teaching materials are available at www.routledge.com/cw/moore

Roy L. Moore is Professor Emeritus of Journalism at the University of Kentucky and retired Professor of Journalism and former Dean of the College of Mass Communication (now College of Media and Entertainment) at Middle Tennessee State University. He holds a Ph.D. in Mass Communication from University of Wisconsin–Madison and a J.D. from the Georgia State University College of Law. He has served as expert witness in several media law cases.

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The revised, sixth edition of *Media Law and Ethics* also includes new chapters by contributors **Aimee Edmondson** of the E.W. Scripps School of Journalism at Ohio University and **Eric P. Robinson** of the College of Information and Communications at the University of South Carolina.

Media Law and Ethics

SIXTH EDITION

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Michael D. Murray
Kyu Ho Youm

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To the memory of Bokim, Kyu Ho Youm's late beloved wife, and of Dr. J. Michael Farrell, our esteemed and valued co-author and colleague.

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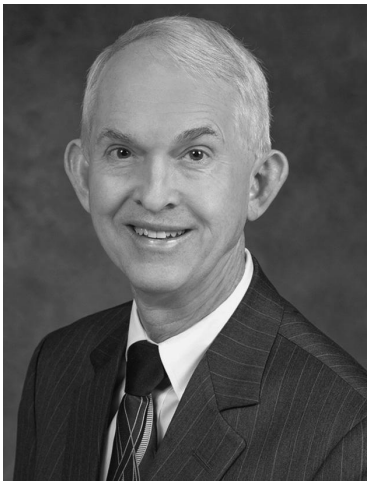
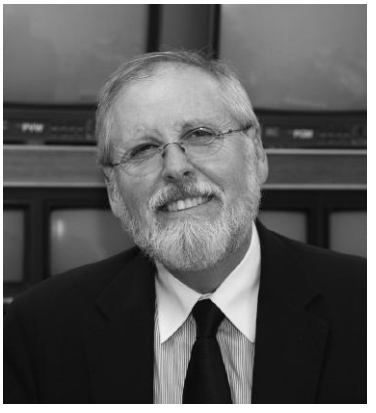


Roy L. Moore is Professor Emeritus at the University of Kentucky, where he was also formerly the Associate Dean of the College of Communications and Information Studies, and retired Professor of Journalism at Middle Tennessee State University. He has served as Dean of the College of Mass Communication (now College of Media and Entertainment) at MTSU and as Associate Vice-President for Academic Affairs and Professor of Mass Communication at Georgia College & State University. While at the University of Kentucky, he served as a Faculty Trustee on the Board of Trustees and as Executive Director of the First Amendment Center. He was also named a "Great Teacher" by the University of Kentucky Alumni Association. He earned his Ph.D. in Mass Communication from the University of Wisconsin–Madison and his J.D. from Georgia State University, where he served as a faculty member in the Department of Journalism for ten years. Prior to that, he was a faculty member at the University of North Carolina–Chapel Hill and Virginia Polytechnic and State University. He is a retired member of both the Kentucky Bar Association and the State Bar of Georgia. He was an American Council on Education (ACE) Fellow at the University of Georgia. He has served as an expert witness in several media law cases. In addition to the previous five editions of this textbook, he is also author of *Advertising and Public Relations Law* (third edition), co-authored with Carmen Maye and Erik Collins. He has chaired both the Law Division and the Mass Communications and Society Division of the Association for Education in Journalism and Mass Communication.



Michael D. Murray is UM Board of Curator's Distinguished Teaching Professor at the University of Missouri's St. Louis campus. He received undergraduate and graduate degrees from St. Louis University and his Ph.D. from the University of Missouri–Columbia. Prior to that, he worked for CBS News and News Election Service. His doctoral dissertation examined Edward R. Murrow's *See It Now* "Report on Senator Joseph R. McCarthy." He was founder and first director of the Communication program (now department) at the University of Louisville, the first person tenured in the field at that institution. He also taught at Virginia Tech and was founding director of the Greenspun School of Journalism & Media Studies at UNLV. He served as department chair before being named a UM Board of Curators' Distinguished Teaching Professor and subsequently served as Chair of the Faculty Senate and University Assembly. He has held fellowships at Columbia University, Stanford University, University of California–San Diego and University of Cambridge. He was John Adams Fellow at the University

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Kyu Ho Youm is the inaugural holder of the Jonathan Marshall First Amendment Chair at the School of Journalism and Communication at the University of Oregon and the 2021 ICA Fellow. He has a Ph.D. from Southern Illinois University and completed graduate studies in law at Oxford University and Yale Law School. A prolific communication law scholar, he has published a number of book chapters and research articles in a wide range of leading journalism and law journals. Youm's law journal articles on freedom of expression have been cited by U.S. and foreign courts, including the House of Lords in the United Kingdom, the High Court of Australia, the Supreme Court of Canada and the Supreme Court of the Philippines. His media law research has been used by U.S. and international lawyers in representing their clients in press freedom litigation. Additionally, he has been quoted by a number of international and American news media, including the *New York Times*, on freedom of expression issues in the U.S. and abroad. A member of the Communication Law Writers Group, Youm has been involved in writing *Communication and the Law*, a major media law textbook in the United States. He also contributed to *Advertising, and Entertainment Law Throughout the World*. A native of South Korea, he has authored a book on Korean press law. Youm has also been Communication Law and Media Policy Editor of the 12-volume *International Encyclopedia of Communication*. He serves on the editorial boards of a dozen leading law and communication journals in the U.S., U.K. and Australia. He is also active on Twitter. His tweets have been noted in Forbes.com's "Eight Great Law & Technology Resources." He was recipient of the Guido H. Stempel III Award for Journalism and Mass Communication at Ohio University E.W. Scripps School of Journalism, as the Wee Kim Wee Visiting Professor at the School of Communication and Information in Nanyang Technological University in Singapore.

Contributing Authors

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Eric P. Robinson is Associate Professor in the School of Journalism and Mass Communications at the University of South Carolina, where he teaches media and Internet law and ethics. He is also "of counsel" to Fenno Law in Charleston/Mount Pleasant, South Carolina. He was previously co-director of the Press Law and Democracy Project at Louisiana State University; deputy director of the National Center for Courts and Media at the University of Nevada, Reno; an affiliate scholar with the Digital Media Law Project at Harvard Law School's Berkman Center for Internet and Society; a staff attorney at the Media Law Resource Center; and a legal fellow at the Reporters Committee for Freedom of the Press. He is the author of *Reckless Disregard:* St. Amant v. Thompson *and the Transformation of Libel Law*, as well as co-author of *Cyber Law & Ethics: Regulation of the Connected World*. He was previously lead contributor and editorial reviewer for *Internet Law: The Complete Guide*. He maintains his own blog, bloglawonline.com. Robinson wrote Chapter 1 and substantially revised Chapter 5.

Preface to the Sixth Edition

Thank you for your interest in this new sixth and thoroughly revised edition of the first college textbook to explicitly address both mass media law and media ethics under one cover. The intersection of these two vital areas often leads to more questions, creates more potential problems, attracts the most interest and provides the best promise for examining important decision-making by the media today.

Interest continues to grow in having both law and ethics blended together in a single course at many departments and schools of communication and journalism. This awareness has evolved as an accepted pattern and a concept endorsed not only by major media programs but also by professional organizations. We have come to an even better understanding of the symbiotic relationship and importance of having these two areas simultaneously addressed. Public confidence in the mass media continues to erode as more journalists and media outlets have been exposed for unethical conduct. The challenges faced by Facebook, Twitter and other social media create another level of interest in terms of related ethical issues.

In addressing these challenges, this new sixth edition continues with the dominant theme—an interspersing of legal and ethical concepts and concerns at every step along the way and, whenever possible and appropriate, including discussion of current views regarding the disposition of key legal cases within an ethical context. With changes taking place quickly in the current media environment, we try to offer the careful reader a look at the regulation of emerging technologies, including expansion of the Internet with international implications.

With the very sad and untimely death of co-author Dr. Michael Farrell, Professor and Director of the First Amendment Center at the University of Kentucky and former managing editor of the *Kentucky Post*, we have recruited two new contributors: Dr. Aimee Edmondson of the Scripps School of Journalism at Ohio University and Dr. Eric Robinson of the College of Information and Communications at the University of South Carolina. Dr. Edmondson is author of the book *In Sullivan's Shadow: The Use and Abuse of Libel Law during the Long Civil Rights Struggle*, which was a finalist for the Frank Luther Mott/Kappa Tau Alpha Research Award for the best book on journalism and mass communication based on original research. Dr. Robinson is author of the book *Reckless Disregard:* St. Amant v. Thompson *and the Transformation of Libel Law*.

Dr. Edmondson is considered a third-generation newspaper person with a wealth of accumulated information to share. Dr. Robinson has spent his career as both an attorney and a scholar examining the morphing of social media and new technologies, focusing on the impact that social media have on the courts, juries and the legal system. He has also worked on legal issues involving the media and growing legal recognition of a form of privilege for academics similar to reporter's privilege and use of public opinion polls presented as evidence, especially in defamation cases. They are working with us to produce specialized chapters devoted specifically to these areas. Dr. Robinson wrote Chapter 1 of this edition and substantially revised Chapter 5, while Dr. Edmondson wrote Chapter 7 and substantially revised Chapter 4.

We function in a regulatory environment in which international influences and the impact of the Internet on such areas as intellectual property rights and privacy continue to be major topics of discussion. Many issues remain controversial. We examine the most contentious of these as well as avenues for legal experts and mass media practitioners to explore the evolving landscape. This new edition has been further expanded to address these topics.

Not only have we continued with a separate chapter devoted exclusively to media ethics but each of the other chapters still includes discussion of the ethical dimensions of specific legal topics. We do

this to explore where the law ends and ethics begin. For example, although the First Amendment protects a reporter who publishes a rape victim's name from the public record, such disclosure is regarded as unethical in the eyes of many journalists. Appropriating another writer's ideas in a story is not copyright infringement so long as only ideas but not expressions are used, but is such conduct ethical? Snapping photos of a severely injured child being pulled from an automobile accident is generally not an invasion of privacy, nor is photographing parents at the moment of being informed of the loss of a child, but most media outlets refrain from publishing or telecasting blood and gore from such an event out of respect for the child and the family.

Comprehension of the law is only the first step. Every journalist must establish a personal code of ethics. There is no shortage of ethical guidelines, but the standards are best understood within the context of mass media law. The question should not be "How do I avoid a lawsuit?" but rather "How do I do what is right?" Answering the latter question is often more difficult than ascertaining the appropriate legal principle, but, as professional communicators, we must be able to respond affirmatively to both queries.

Mass media law and media ethics are inseparable and complement one another in a way that makes the bond between them stronger than the base on which they each stand individually. We believe our enthusiasm and attention to the relationship between media law and media ethics are very well represented in this text. Similarly, in addition to Dr. Youm's revised international chapter, we have addressed related, international cases and issues as they arise logically throughout the book. Similarly, we have addressed the myriad emerging ethical issues related to mass media performance and political communication in relation to the law.

We welcome and benefit from comments made by those who use this book. We want to thank especially those who have helped us in improving this practical resource for budding professional communicators. We hope our readers will adopt and practice high ethical principles and develop a keen understanding of media law so they are well prepared to enter the world as professional communicators.

Thanks to our great friends and new contributors, Drs. Edmondson and Robinson. We also thank our many friends around the country for their comments and encouragement over many years. We have been blessed with great teachers, tremendous colleagues and exceptional students. For their invaluable assistance on the new sixth edition of this textbook, we are especially grateful to our excellent editors, Paul Stringer, Grant Schatzman, Faye Gardner and Brian Eschrich.

Our special thanks go to our devoted families. When the two first authors met close to a half century ago and shared office space as assistant professors in a converted dormitory at Virginia Tech, our wonderful wives set the tone and helped to keep us "on track." They have supported us on assignments and chipped in on occasions when the burdens became great. Now grown up, our children have children of their own. The loss of Dr. Youm's dear wife, Bokim, whom we all knew well, had special meaning. For this reason we are devoting this sixth edition to her memory, and also to that of our late co-author and colleague, Dr. Mike Farrell. Finally, Dr. Youm wishes to express his sincere thanks to his research assistant, Brent Crowley, for his invaluable assistance with his work on this book.

Roy L. Moore, Michael D. Murray and Kyu Ho Youm

Chapter 1

American Law, the Legal System and the Judicial Process

Eric P. Robinson

> *As Justice Sewall [of the Massachusetts Supreme Judicial Court] observed 237 years ago, district judges "stand alone, and unassisted." Unlike politicians, they work largely outside of the public eye. Most Americans have some sense of their role, but that perception has surely been shaped, for better and worse, by movie and television portrayals of the American jury trial. In the typical depiction, the trial judge has a bit part, sitting passively amidst the soaring rhetoric of the attorneys, the heroism or villainy of their clients, and the moral compass of the jurors. Real-life trials usually lack that drama—but then they are not meant to be entertainment. Rather, they are carefully structured mechanisms for resolving legal disputes through an adversarial process. In conducting trials, the district judge serves as the calm central presence to ensure fair process and justice for the litigants.*
>
> —John J. Roberts, Jr., Chief Justice of the United States,
> *2016 Year-End Report on the Federal Judiciary*[1]

In the ancient parable *The Blind Men and the Elephant*—originally from the Indian subcontinent[2]—a group of blind men encounter an elephant, and each assumes that the creature as a whole is characterized by the nature of the part that they are touching. The man touching the side of the elephant claims that the creature is like a wall. The man feeling the tusk claims that an elephant is pointed like a spear. The one touching the trunk says it is like a snake, while the one touching the elephant's leg claims that it is like a tree. The man feeling the ears states that an elephant is soft and floppy, like a fan. And the blind man touching the elephant's tail says the creature is like a rope. Of course, none of them are right; but none of them are entirely wrong.

The legal system is similar to the elephant that so confounded the blind men in that it consists of various parts that look and operate differently. The component parts of this system—legislatures, trial and appellate courts, administrative agencies, elected and appointed officials and many more—operate both in both coordinated and autonomous ways, yet somehow together they operate simultaneously to create a system that we refer to as "the law." This chapter examines the sources and categories of American law, from the U.S. Constitution to equity. Traditional categories of law, such as civil versus criminal and tort versus contract, are also distinguished as a background for later chapters that analyze specific court cases.

Civil and Common Law Systems

Before we begin to explore the American legal system, we should understand its basic nature. In nature, biologists have classified living things into various categories: elephants, for example, are broadly

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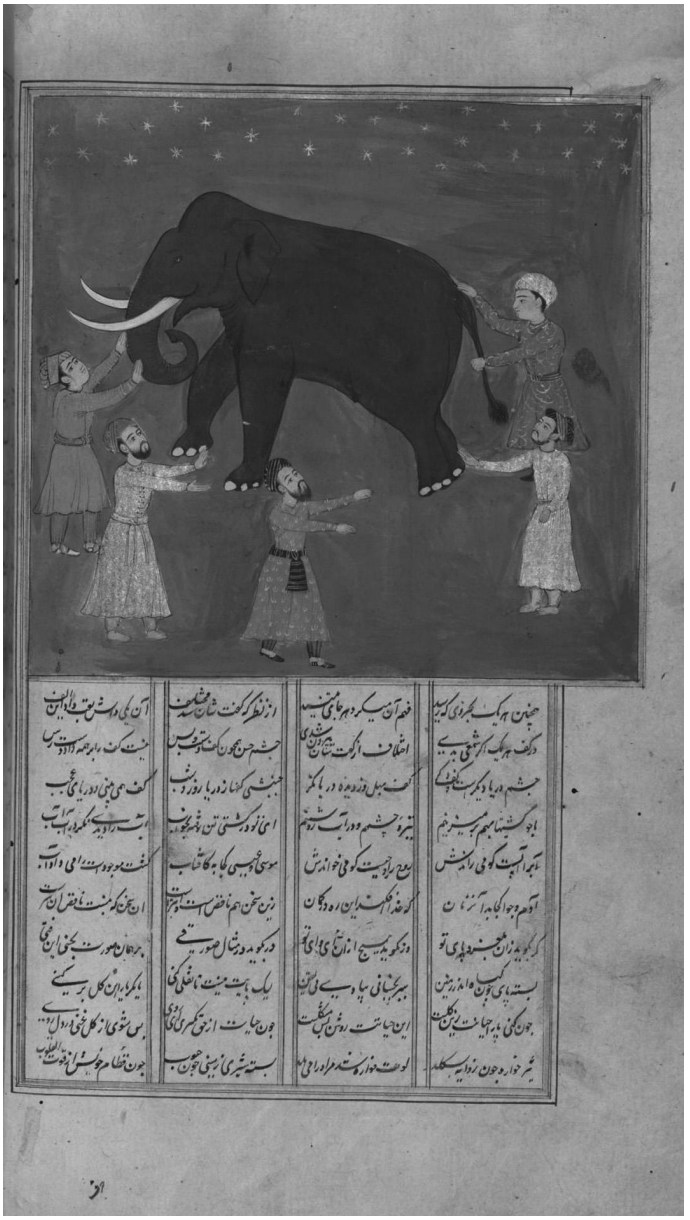


Figure 1.1 An illustration of "The Blind Men and the Elephant" from *Masnavi-i ma'navi* (*Collection of Poems*), written by Jalal al-Din Rumi and published in India in 1073 AH/AD 1663.

Source: Walters Art Museum, Baltimore, MD.

classified as either *Loxodonta africana* (African elephants) or *Elephas maximus* (Asian elephants), with various subspecies of each of these types. In law, there are essentially two basic types of legal systems: civil law systems and common law systems.

Civil[3] law systems are actually the most common around the world. They are used in 150 countries around the world, including most European countries (including France, Germany and Spain) and their former colonies in Africa and South America, as well as China and Japan.[4] In such systems,

the law is fundamentally rooted in a written code of law, which attempts to set out standards and rules for as many circumstances as possible. The role of courts in a civil law system is to apply the code in a particular case. This can often be straightforward, when the legal code has a directly applicable provision that can easily be applied. But the task can be difficult when a particular case raises an issue that the authors of the code did not anticipate: in such cases, judges do their best to make decisions based on the essential purpose of the code.

The United States uses a *common law* system, which was inherited from the United Kingdom and is used in 80 countries worldwide.[5] In this system, at least originally, there is no fundamental written code that purports to impose legal standards in any possible circumstance. Instead, individual judges make decisions in particular cases, each of which constitutes a precedent for future courts to follow (a principle known as *stare decisis*). This accumulation of decisions grows over time to constitute a *common law* of general rules and principles.

There is an exception in the U.S. legal system in the state of Louisiana. That state's law is based on a civil system stemming from its roots as a French and Spanish colony, although it also now incorporates many common law elements.

As a practical matter, the distinction between common and civil law legal systems has become muddled over time. Common law systems now have written documents, including constitutions, statutes and regulations, that courts apply and interpret in individual cases. And courts in civil law systems will often consider prior court rulings in interpreting and applying the fundamental legal code.

There are five major categories of law under our common law system that form a hierarchy of authority: *constitutional law* is at the top, followed by *statutory law*, *administrative rules and regulations*, *common law*, and, finally, *equity*. All of these are "sources of law" that, like the constituent parts of the elephant in the ancient fable, look and operate differently, but work and join together to create what we call "the law."

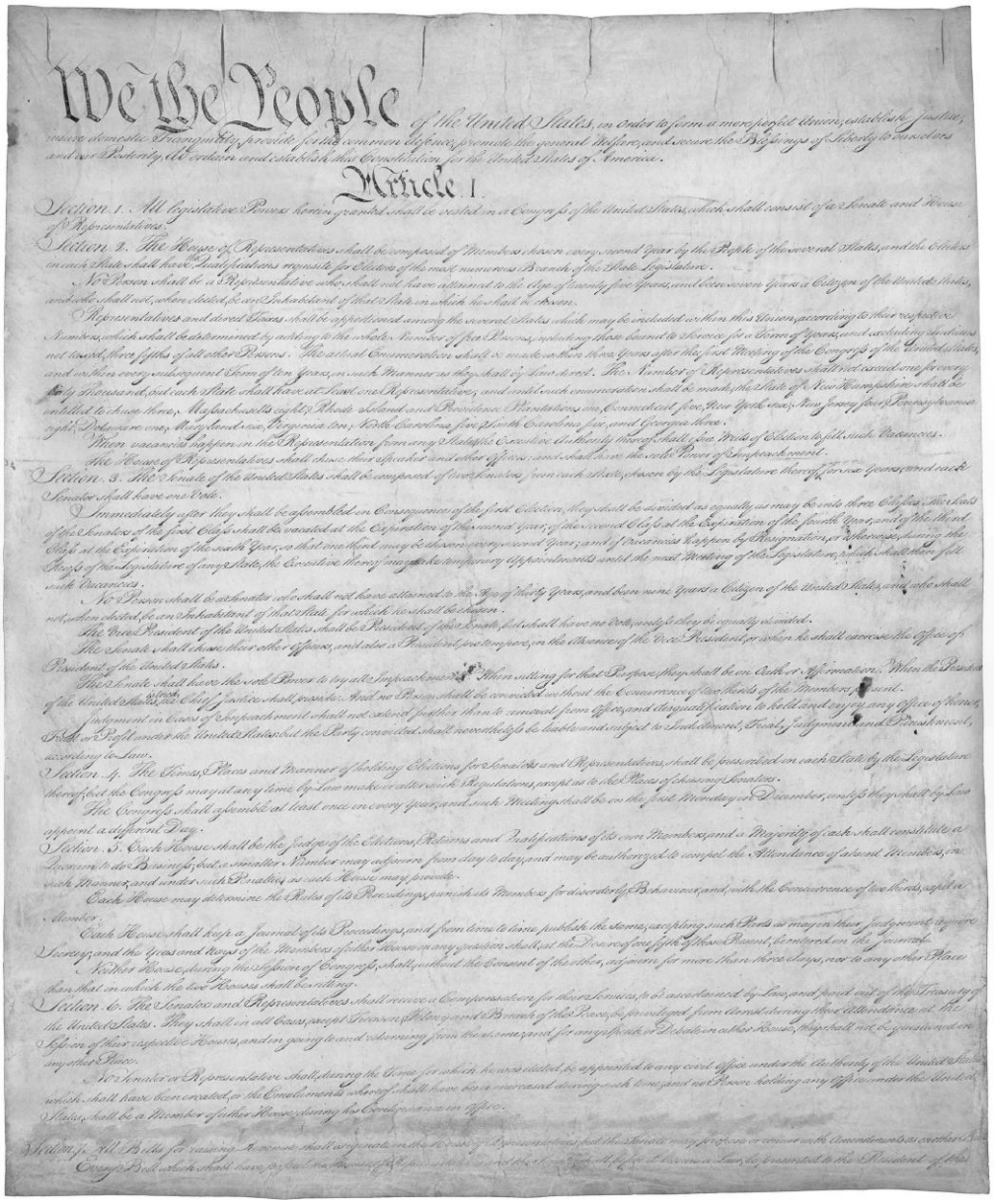
Constitutions

Virtually all nations around the world—including the United States—have written constitutions, which establish the basic structure and operation of their national governments.[6] Many national constitutions—again including the United States Constitution—also delineate specific restrictions on governmental power, including a listing of rights of citizens. In addition to their written constitutions, most nations have developed *unwritten constitutions*: norms and standards regarding how government should operate and which operate alongside the written constitutional rules.

The Federal Constitution

The United States Constitution was written in 1787 and went into effect the following year when it was ratified by nine of the 13 American colonies.[7] The Constitution was actually the second attempt at a governing document for the United States after it declared independence from Britain: the prior Articles of Confederation, which had been drafted in 1777 and went into effect in 1781, had created a weak national government that was widely seen as ineffective. Dissatisfaction with the Articles of Confederation led to a convention of states' representatives in Philadelphia to revise the Articles, but which ended up proposing a new constitution instead.

The authors of the U.S. Constitution debated numerous proposed provisions, few of which actually survived to become incorporated into the final draft. The general consensus among the delegates indicated that only a strong central government could overcome the serious problems that quickly doomed the Articles of Confederation. Although there was some strong disagreement, the representatives as a whole felt that such a strong central government had the best chance of maintaining unity and coordination among the individual states and commonwealths. However, they felt even more strongly that no one interest or person, including the head of state, should be accorded supreme


We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common Defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article. I

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section. 3. The Senate of the United States shall be composed of two Senators, from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the

Figure 1.2 The first page of the United States Constitution, including the opening paragraph, known as the Preamble.

Source: U.S. National Archives.

authority over the federal government. Thus, a separation of powers, similar to the structure already established in a majority of the constitutions of the 13 original states, was created.

As a result, the U.S. Constitution establishes a national government consisting of three branches: the *legislative* branch (Congress, consisting of the Senate and the House of Representatives); the *executive* branch (the president and the departments and agencies within the branch); and the *judicial* branch (topped by the United States Supreme Court[8]). At their most basic level, the legislative branch adopts

laws, the executive branch administers those laws, and the judicial branch interprets and applies the laws. But, as we'll see, the modern reality is much more complicated.

Some such complications are included in the Constitution itself, in terms of *checks and balances* between the three branches. For example, Congress proposes and passes laws, but the president has the ability to approve or veto most bills passed by Congress. If the president approves (signs) the bill, it becomes a law. But if the president vetoes a bill, Congress can still put the law into effect by voting to override the veto. Even once a law goes into effect, the executive branch can to some extent determine how it is applied and enforced. And the courts, including ultimately the United States Supreme Court, play a role in interpreting and applying the law in particular cases, as well as determining whether the law is or is not authorized by the Constitution itself.

Other complications stem from the norms and standards that form the *unwritten constitution*.[9] For example, the rules and procedures of both houses of Congress give substantial power to political party leaders and to chairs of various committees, including the ability to fast-track, hobble or even block a particular bill. In the Senate, a single senator can block a vote on a bill by staging a filibuster; continuing to discuss a bill (or anything else, really) without stopping, or, these days, by threatening to do so. The authors of the Constitution also did not foresee the vast growth of the administrative part of the federal government, consisting primarily of departments and agencies within the executive branch of goverment: in 2013, over 97 percent of all federal civilian employees worked for units within the executive branch.[10]

The Bill of Rights

Besides establishing the structures and processes by which the national government works, the U.S. Constitution also includes provisions regarding the rights of American citizens that the government—the federal government at first, but eventually state and local government as well—cannot infringe. These rights are mainly contained in the *Bill of Rights*, the first ten amendments to the Constitution. These amendments were added to the Constitution in 1791 and are the direct result of the debate over whether or not the Constitution should or should not be ratified. Those who opposed the Constitution, known as anti-Federalists, argued that the powers of the proposed national government were so vast that the Constitution needed to include restraints on that power, particularly regarding the rights of individuals.[11] But the Federalists, those in favor of the Constitution, defended the exclusion of a listing of rights from the Constitution as proposed, arguing that any listing of rights would necessarily exclude some rights that the government would then feel free to limit.[12] While the Federalists won the argument for ratification of the Constitution as written, they achieved ratification in several states by agreeing to soon adopt amendments protecting individual rights against encroachment by the federal government.

Under the terms of the new Constitution, amendments had to be approved by both houses of Congress by at least two-thirds votes and then ratified by two-thirds of the states.[13] Those amendments were debated in Congress in 1789. James Madison, then a Federalist member of Congress from Virginia, originally proposed nine revisions of the Constitutional text in order to protect individual rights. Congress eventually reformulated these into 12 proposed amendments which would be added to the existing text of the Constitution, rather than changing the text of the main body of the document. The proposed amendments protected individual rights, required the government to follow due and fair processes in criminal prosecutions, and also would have made set rules regarding the formation and salaries of Congress.

These latter two provisions were actually the first and second of the proposed amendments. The first proposed amendment would have set the maximum number of constituents that each member of the House of Representatives would represent at 50,000. The second proposed amendment had language barring Congress from raising its own salaries, allowing it to only raise salaries for future members. Neither of these amendments were ratified by enough states, leaving ten amendments that were added to the Constitution.[14] The amendments that were ratified, originally the third through twelfth proposed amendments, were renumbered, making what had been the third of the originally proposed amendments into the first. The ten constitutional amendments that resulted from this process are known as the Bill of Rights.

The First Amendment

As adopted, the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

This 45-word paragraph protects five distinct rights from encroachment by the government: freedom of religion (by both prohibiting an official, government-sanctioned religion and by guaranteeing that citizens may exercise, or practice, the religion of their choice); freedom of speech; freedom of the press; freedom to assemble peacefully; and the right to bring grievances to the government.

It is important to note that the First Amendment and its state equivalents discussed below only apply to restrictions on speech, the press and the other rights by entities of the federal, state or local governments. (Courts have interpreted the term "Congress" to encompass actions by all three branches of the federal government, and in 1924 the U.S. Supreme Court held that the language of the Fourteenth Amendment makes the First Amendment limitations applicable to state and local government.[15])

But non-government entities—private companies and private employers, for example—are generally not subject to the First Amendment limitations, and thus may restrict speech and the other rights with almost complete impunity. (Civil rights laws do limit private entities from discriminating on basis of characteristics such as race, ethnicity, marital status, parenthood and sexual orientation.) Thus, for example, a federal appeals court in 2020 affirmed the dismissal of a lawsuit brought by conservative talk show host Dennis Prager against YouTube over restrictions it placed on some of his videos posted to the platform.[16] The few instances where courts have held that private entities are unable to restrict speech have been when the entity maintains a "public forum," such as in a company-owned town.[17] While the First Amendment does not place limits on restrictions that private entities can impose, many social media sites profess a policy of fostering free speech on their platforms; but they still impose some limits.

Annual nationwide surveys have generally shown varying levels of knowledge of the rights in the First Amendment. In 2020, 73 percent of Americans named freedom of speech as a right contained in

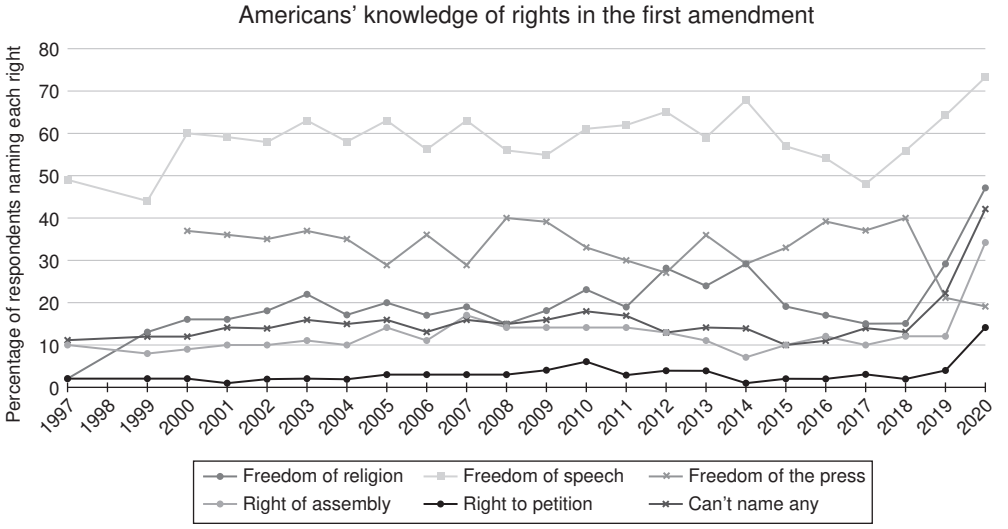


Figure 1.3 Annual surveys have shown varying levels of knowledge of the rights protected by the First Amendment.

Source: Chart created by Eric P. Robinson. Data from Newseum/Freedom Forum Institute (1997–2016, 2018–19; Annenburg Center (2017, 2020).

the First Amendment. This represents a major increase from 2017, when 48 percent could name it. The focus and controversy over these rights during the Trump Administration likely led to this increased knowledge. Knowledge of the other First Amendment rights also saw major increases: 47 percent identified freedom of religion in 2020, up from 15 percent in 2017; 42 percent named freedom of the press, up from 14 percent; 34 percent named right of assembly, up from 10 percent; and 14 percent named the right to petition the government, up from 3 percent. The share of respondents who could not name any First Amendment rights fell to 19 percent in 2020 from 37 percent in 2017.

This book, and the courses it is intended to be used for, focuses primarily on the free speech and free press provisions of the First Amendment. As we'll see, these brief phrases have been the subject of many court decisions interpreting and applying these provisions in a wide variety of circumstances, with many government rules and actions regarding speech and media held unconstitutional under the First Amendment.

The First Amendment is just one of ten amendments in the Bill of Rights, and American courts have consistently ruled that First Amendment rights are not to be favored over other individual rights granted in the Constitution.

Some of the other constitutional amendments have legal impact on the media. The Sixth Amendment, which provides several protections for criminal defendants, including that they are entitled to "a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed …"[18] The requirement that trials be public allows the media to cover them, and to speak about them under the First Amendment, but in some circumstances media coverage of a trial can make it difficult to find impartial jurors. Courts have struggled with this conflict, as explained in detail in Chapter 7.

The Fourteenth Amendment, ratified after the Civil War to guarantee the rights of former slaves, provides that states may not "deprive any person of life, liberty, or property, without due process of law,"[19] a phrase that has been interpreted as imposing the First Amendment protections of speech and the press to actions by state and local governments.[20] This inclusion of First Amendment and other constitutional rights within the Fourteenth Amendment is known as the *incorporation doctrine*.[21]

The result is that, in free speech cases involving an action by state or local government, courts will declare whether or not the challenged action violated the First and Fourteenth amendments. However, some courts will just invoke the First Amendment with the unstated understanding that the free speech and press provisions of the First Amendment apply to state and local governments by virtue of the Fourteenth Amendment.

State Constitutions

The American national government is called a "federal" government because it shares power with state governments.[22] But state governments—and local governments, which are created under the auspices of the states—generally are concerned with more local issues, such as streets and vehicles, most common crimes, land and property issues, while the federal government is more concerned with national matters such as national defense, foreign policy, and immigration. But the dividing lines between federal, on the one hand, and state and local, on the other, government responsibilities are not clear, and in some cases the federal and state governments share powers over particular items or issues. For example, while the states generally build and maintain the roads in their borders, the Interstate Highway System is overseen and funded by the federal government.[23]

Sometimes, there are disputes over the division of authority between the federal and state governments. This has especially been true since the 1930s, when the Great Depression and then World War II led to a vast expansion of the federal government and its influence on everyday life. For example, federal law provides that the Federal Aviation Administration—part of the federal Department of Transportation—has exclusive authority over aircraft over United States territory. But several state and local governments have attempted to enact their own laws regarding use of drones, and these laws may conflict with FAA authority.[24]

Besides the federal constitution, each of the 50 states has its own constitution. Similar to the federal version, these state constitutions establish the basic structures of state government, usually in a way that mimics the federal government's structure of a two-house legislature, a governor who is the chief executive for the state and who oversees departments and agencies that carry out government policy, and a court system. Another similarity to the federal system is that no state government can take action or enact a law or regulation that violates either its own constitution or the federal constitution.

There are also differences between the federal and state constitutions. Most state constitutions are much longer than the federal constitution and cover a wider variety of governmental issues and concerns. And while the federal constitution has remained the same fundamental document—with periodic amendments—since 1787, most states have rewritten and adopted new versions of their constitutions over the years. And besides having been rewritten numerous times, state constitutions are amended by rewriting the text of the document itself, rather than appending on amendments as has been done with the federal constitution.

Each of the 50 state constitutions has a provision that protects speech and the press, similar to the First Amendment to the federal constitution. Some of these provisions are virtual duplicates of the First Amendment in the U.S. Constitution. For example, the South Carolina Constitution provides that "The General Assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government or any department thereof for a redress of grievances."[25] Other states' provisions differ. For example, the North Carolina Constitution provides that "Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse."[26]

Judicial Review

The federal constitution is the fundamental legal document of the United States. This means that the government—federal, state and local—cannot legally act in a way that is contrary to the provisions of the U.S. Constitution. As stated in the Constitution itself, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding."[27] Thus any statute, rule or action by the government that contradicts or conflicts with a provision of the U.S. Constitution will be held to be *unconstitutional* by the courts, and be null, void and unenforceable.

The U.S. Supreme Court itself declared that it and lower courts had the power to declare government actions unconstitutional in an 1803 ruling, *Marbury v. Madison*. The case involved judicial appointments by the second president of the United States, John Adams, which was made just as his successor and political opponent Thomas Jefferson was to be inaugurated as president. Jefferson refused to honor the appointments because the paperwork was not fully processed by the time Adams left office. William Marbury and the other appointees sued, and the U.S. Supreme Court, in a unanimous decision written by Chief Justice John Marshall, held that the appointees had the right to the judicial positions, and that there was a legal remedy that they could pursue. But the court also held that the statute passed by Congress that allowed them to bring the lawsuit to the U.S. Supreme Court directly was unconstitutional, because it expanded the kinds of cases that could be brought to the Court beyond what is permitted by the Constitution. Because the lawsuit itself was invalid, the Court ruled against the appointee.[28]

Marbury v. Madison established the principle of *judicial review*: that the courts have the inherent power to determine whether government actions were valid under the U.S. Constitution. This effectively made the U.S. Supreme Court the final arbiter or interpreter of the U.S. Constitution, while the highest appellate court in each state (usually called the Supreme Court, although designated by another name in some states) is the final arbiter of the meaning of that state's constitution.

Although the courts used this power sparingly at first, since the early twentieth century it has become routine for the U.S. Supreme Court and lower federal and state courts to declare that statutes, rules and actions by federal, state and local government officials and agencies are unconstitutional.

In the cases we'll examine in this book, the courts have ruled whether government rules or actions violated the free speech and free press provisions of the First Amendment. But while most court decisions regarding freedom of speech and of the press are based on application of the First Amendment to the U.S. Constitution, some court decisions on these issues are based on state constitutions' provisions regarding free speech.[29] In some of these decisions, courts have interpreted a state constitution's free speech provision more broadly than the First Amendment has been. For example, the U.S. Supreme Court has held that the First Amendment does not stop the owner of a shopping mall from barring groups that want to solicit petition signatures in the mall, since it is private property.[30] But state courts in California, Massachusetts, New Jersey and Oregon reached different conclusions under their states' constitutions.[31]

Statutory Law

While the American legal system is a *common law* system, in which court precedent plays a primary role, statutes—written legal codes adopted by Congress and state and local legislative bodies and approved by a government chief executive or by the legislative body overriding that executive's veto—also play a major role.

Statutes cover a wide variety of topics, and include laws that make certain activities illegal and other laws that enact certain policies. Most statutes are enforceable by the government taking action in court, particularly in criminal prosecutions. But some statutes allow private individuals to file a lawsuit to enforce or apply the statute. And because of the supremacy of the federal constitution, individuals and groups may also file lawsuits alleging that a statute, or the application of a statute to a particular situation, violates a constitutional provision such as the First Amendment.

Statutes are compiled into *codes*, organized by subject matter (such as copyright, obscenity, criminal acts, taxes, etc.). The United States Code, abbreviated to "U.S.C." in legal documents, is the collection of compiled statutes passed by Congress. Because new statutes pass every year, it is important to reference the most recent version of the code; new laws are added to the code as they adopted, often replacing older, now outdated, provisions. In addition to being published in an official version by the government,[32] numerous publishers and websites publish the code, although they differ on how often the content is updated. The non-governmental versions often include notations and commentary about the statutes, including summaries of court decisions interpreting and applying the statutory provisions.

States and local governments enact their own statutes. State codes are usually published in official and/or unofficial versions, both in print and online. Availability of local statutes is less consistent.

With 50 state legislatures (plus territorial legislatures) and 38,779 general purpose local governmental entities in the United States,[33] it is inevitable that the statutes they enact will contradict and sometimes conflict with one another. To some extent this is desirable, since it allows state and local governments to experiment with different policies based on their unique conditions. But it can also create problems with commerce between different communities and with activities that are broader in scope, such as the Internet.

The solutions vary. On some issues, including several of the free press and free speech issues that we'll be examining, the Constitution or federal legislation sets a national policy and standard which must be followed. On other topics, groups such as the American Law Institute establish a national standard that state and local governments are encouraged to adopt to create uniformity in matters that often involve two or more governmental regions, such as business transactions and child custody. Thus, for example, most states have adopted, with only slight variations, the standardized Uniform Commercial Code to cover the buying and selling of products and services, including those occurring online. On other topics, a particular state's law has become a *de facto* national standard, because of

the importance of that state in a particular industry. So, for example, many websites now conform to California's laws regarding Internet privacy for all their users, regardless of what state the website and its users are in, since California's law is generally more strict and comprehensive than other states', and because it would be difficult to use different privacy standards for users in different places.

Still, with so many government authorities passing their own laws, conflicts are inevitable. As a result, courts are often required to determine which authority's law applies in a particular case.

Administrative Law

As noted above, the bulk of employees of federal government work for departments and agencies within the executive branch. Each department and agency focuses on particular topics and issues. Examples include the Federal Trade Commission, the Department of Transportation, the Social Security Administration, the Consumer Financial Protection Bureau and the Department of Homeland Security.

A federal agency with a significant role in regulation of the media is the Federal Communications Commission (FCC), which oversees all uses of the public airwaves in the United States, including radio and television broadcasting. The FCC obviously has a role in regulating these media. But other agencies that regulate in other areas also can affect the media. For example, the Federal Aviation Administration, part of the federal Department of Transportation, oversees all use of airspace above our heads, including flights of drones (encompassing drone use for news coverage or for making Hollywood movies). The Federal Trade Commission oversees how companies market and sell their products and services, including watching for deceptive advertising. Even the Securities and Exchange Commission, which oversees stocks and bonds, regulates the media by requiring disclosure of reporters' and commentators' financial interests.

State and local governments have their own departments and agencies whose regulations may impact the media or raise free speech concerns.

All of these departments and agencies are created by the relevant legislature, and each of them operates under the authority of the statute that created them. If the department or authority takes an action beyond the scope of the legislation that created it, the action can be invalidated in court. Department and authority actions can also be challenged on the grounds that they are unconstitutional.

Departments and agencies issue regulations (a quasi-legislative function) and have the power to penalize those who violate those regulations (a quasi-judicial function). The bodies that preside over hearings relating to violations are often deceptively called "courts" and presided over by people incorrectly called "judges." Examples of this are "immigration courts," which are actually administrative tribunals within the federal Department of Justice, an administrative agency.

Regulations and other actions by federal agencies are published in the daily *Federal Register* (Fed. Reg.) and compiled in the *Code of Federal Regulations* (C.F.R.). Although most states publish their administrative rules and regulations in some official format, in some states it may be necessary to contact the relevant agency.

In addition to department and agency regulations, the president can on his or her own issue executive orders and, when signing legislation passed by Congress, issue signing statements that describe how the executive branch interprets and will apply particular statutes. During the George W. Bush administration, officials cited an executive order that had been signed by President Ronald Reagan in 1981[34] as authorizing collection of data of Americans' cell phone calls and messages that caused an uproar after the program was revealed in 2013 by former National Security Administration contractor Edward Snowden.

Common Law

When the United States declared independence in 1776, all of the statutory and case law of England and the colonies prior to that time became the *common law* in the United States. This type of law still exists today, although its significance has declined considerably over the decades.

Common law is often called "judge-made law" and "case law," although these terms do not represent the total picture. At least in theory, judges do not make law; they merely determine the specific legal principle or principles appropriate to the particular case at hand, whether based on constitutional, statutory or common law, and apply it to the given situation. The principles that emerge from these individual decisions constitute the *common law*.

In the modern U.S. legal system, the common law fills in the gaps left by statutory and constitutional law. But in terms of how authoritative it is, common law is *always* inferior to constitutions, statutes and administrative regulations and rulings. If a conflict occurs between common law and these other sources of law, the other source is more authoritative.

Equity Law

Equity law can be traced to British courts of chancery that developed primarily during the fourteenth and fifteenth centuries. Over the decades, aggrieved individuals found that courts of law (i.e., common law) were often too rigid in the kinds of actions they could consider and remedies they could provide. For example, while most courts at the time adhered to the maxim that money damages could right any wrong, in many instances, such as disputes over land ownership, damages simply were not adequate. Parties would then appeal to the king for justice because the sovereign was not bound by common law rules. Eventually, the king created special courts of chancery that could be used when the common law remedy was inadequate, unfair or not available.

One of the great strengths of equity courts was that they could take measures to prevent or mitigate legal wrongs. The general notion is that equity decisions are based on fairness or justice, not according to strict rules of law. Although common law generally allows only for money damages, equity can be broader and flexible.

While courts of law and courts of equity were separate in England for many centuries, today they are merged procedurally in the British courts and in all federal and nearly all state courts in the United States. Thus, plaintiffs seeking equitable relief generally will file suit in the same court as they would in seeking a remedy at law and can now seek both types of remedies. However, in some states lower level courts have either limited or no power to grant equitable relief. Even when equity and common law courts have been merged, procedures in equity matters may differ somewhat from those in law cases. Journalists must understand these distinctions when covering equity cases.

One example of an equitable remedy is an injunction either barring or requiring a certain action. Another is *specific performance*, which is another way of ordering a specific action to occur. An example is a U.S. District Court ordering a federal agency to reveal records that a media organization has requested under the federal Freedom of Information Act. A court of law would be confined to awarding monetary damages, even though money would clearly be inadequate to resolve the fundamental issue.

The Courts

While the legislative branch of government is primarily responsible for enacting statutes, and the executive branch is primarily responsible for putting statutes into effect, the function of the judicial branch—the courts—is to apply and interpret the law. As we have seen, this includes the power to declare that government statutes, administrative rules or actions violate the Constitution.

The U.S. Supreme Court

At the pinnacle of the U.S. court system is the United States Supreme Court in Washington, D.C. This is the highest court in the United States: there is no higher court to which an appeal can be taken.[35] This does not necessarily mean that the Supreme Court's decisions are always right. As U.S. Justice Robert H. Jackson famously said about the Court and its decisions, "We are not final because we are infallible,

but we are infallible only because we are final."[36] In other words, even if the U.S. Supreme Court's decision in a particular case is incorrect, it is the final word on a particular legal issue.

But there are actually a few different—albeit difficult—ways to change the law after a U.S. Supreme Court ruling. If the court holds that a particular statute or regulation is unconstitutional, the legislature can rewrite the law so that it achieves the same purpose in a way that is constitutional. Or the U.S. Supreme Court itself can overrule a prior decision in a subsequent case. Or the U.S. Supreme Court decision can be made moot by amending the constitution.

Flag-burning is an example of a situation in which all of these possibilities were explored. In 1989, the U.S. Supreme Court held in a five-to-four decision that federal and state laws making burning the American flag a crime violated the First Amendment when applied to burning the flag as a form of political protest, since it was effectively banning a particular type of speech.[37] The reaction in Congress was swift and harsh, leading to the enactment of a revised version of the federal law barring flag-burning.[38] But the Supreme Court, in another five-to-four decision, held in 1990 that the new statute also violated the First Amendment, and was unconstitutional.[39] This led to calls for a constitutional amendment to allow a prohibition of flag-burning, but proposals for such an amendment have repeatedly failed to pass in Congress.[40]

It is also important to note that while the U.S. Supreme Court and lower federal state courts can declare a statute, rule or policy unconstitutional, the courts do not have any power to actually enforce their decisions and orders. Instead, they rely on the executive branch to either act or not act in accordance with court rulings. For example, despite the United States Supreme Court's landmark ruling in *Brown v. Board of Education* (1954) that racial segregation in public education was unconstitutional,[41] many school districts resisted or ignored the Court's ruling for several years.[42] But, in general, America's social and political culture accords respect to court rulings, and generally follows courts' rulings even if many or most people disagree with them.

Characteristics of the U.S. Supreme Court

While the number of justices on the court has varied, it has been nine since 1869. One of the justices is designated as the *chief justice*, whose role includes not only the judicial responsibilities of the court but also overseeing the running of the court and all lower federal courts. The chief justice is considered the highest in seniority on the Court, regardless of how long he or she has actually served in that role. The other justices are *associate justices* and are ranked in seniority by how long they have served on the Court.

The Supreme Court justices are aided in their work by clerks, who are usually recent graduates of the nation's most prestigious law schools. The influence of the clerks on the justices' rulings is the subject of much speculation, although it is clear that they play a major role in the process of the Court's decisions on whether to hear particular cases, summarizing the many cases that come to the Court for review.[43]

The length of service on the Court can be long indeed, since Supreme Court justices, like all other federal judges, are appointed for life: until they die, retire or resign. Justice William O. Douglas had the longest tenure on the Court: 36 years, seven months and eight days (April 17, 1939, to November 12, 1975).[44] Like lower federal court judges, the Constitution provides that they can keep their jobs "during good Behaviour,"[45] and be removed only by impeachment by Congress. There has never been a successful impeachment of a Supreme Court justice: Associate Justice Samuel Chase was impeached the House of Representatives in 1804, but he was acquitted after a trial in the Senate and thus not removed from his position.

Almost all of the cases that come to the Supreme Court come after review from the lower federal appeals courts, or from state appellate courts.[46] But the Supreme Court does not simply accept all such appeals. Instead, the party or parties seeking to appeal a lower court's decision must file a petition to be heard by the U.S. Supreme Court. This is known as a *petition for writ of certiorari* or a *petition for cert.* for short. The Court gets to decide which cases it will hear; agreeing to hear a case is known as *granting certiorari* or *granting cert.* Each year, the Supreme Court receives between 7,000 and 8,000 certiorari petitions, but grants certiorari and hears only about 74 of them.[47] The Court is more likely to grant certiorari in cases

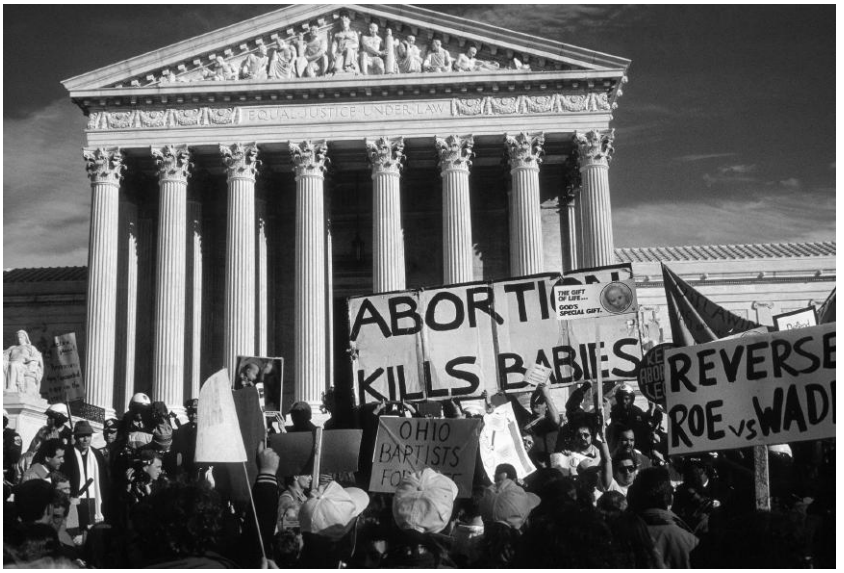


Figure 1.4 The plaza in front of the United States Supreme Court building in Washington, D.C., is frequently the location for rallies and protests in which citizens exercise their rights under the First Amendment.

Source: Mark Reinstein/Shutterstock.com.

in which the lower appeals courts have disagreed on a legal issue, and in cases that raise important legal questions that the Court feels should be clarified.

The certiorari petition is filed with the Supreme Court by the party that wishes to appeal a lower court ruling. The opposing party, which usually is satisfied with the result in the lower court, will often respond with a legal document, known as a *brief*, laying out an argument that the Supreme Court should not or need not take the case. Depending on the specifics of the case, third parties not directly involved in the case but with an interest in the result may ask the Court to file their own briefs in support of the Court granting or denying cert. In some cases, the federal government, which is represented at the Court by the Solicitor General's Office within the Department of Justice, asks or is asked by the Court to weigh in as well.

The justices meet every Friday during the Court's term, which runs from October through May or June, to consider certiorari petitions. Sometimes a particular case will be considered at several of these meetings. It takes four justices—less than a majority—for the Court to grant certiorari in a particular case, although the votes are secret and usually are not disclosed until long after the vote is taken.

If not enough justices vote to hear a case, the certiorari petition is denied and this result is announced by the Court. The practical effect is that the lower court decision, whatever it is, stands as the final result in the case. A denial of certiorari is not, however, a ruling on the legal issues or merits of a case, and the Supreme Court's action is not a precedent that can be cited in future cases.

If four justices agree to hear a case, the certiorari petition is granted and parties submit briefs advocating their positions. Again, third parties—known as *amici curiae*, or friends of the court—may ask to file their own briefs weighing in as well. And the Solicitor General's Office may also file a brief or be asked to do so by the Court.

After all the briefs are filed, the case is scheduled for oral argument. This takes place in the Supreme Court courtroom in Washington, D.C., although arguments were done via telephone conference call during the coronavirus pandemic in 2020 and 2021. Each side of a case usually gets 30 minutes to make its argument orally before the Court, but much of that time is taken up by the justices asking the

lawyers questions about their positions. While the justices address the questions to the lawyers, they often choose and phrase their questions in order to make points to their fellow justices. Justice Antonin Scalia, who served on the court from 1986 until his death in 2016, explained that: "It [oral argument] isn't just an interchange between counsel and each of the individual Justices. What is going on is also to some extent an exchange of information among the Justices themselves. You hear the questions of the others and see how their minds are working, and that stimulates your own thinking."[48]

Transcripts of oral arguments are made available on the Court's website the same day that they occur; the recordings are usually available on the site at end of the each week. Archived recordings of oral arguments since 1955 and transcripts since 1968 are available on the Court's website; the oyez.org website maintained by Cornell University's Legal Information Institute, Justia, and Chicago-Kent College of Law; or at the National Archives.

After oral argument, the Court's justices will usually discuss the case at their next Friday meeting. Starting with the Chief Justice and then in order of seniority, the justices will each give and explain their individual initial opinion in the case. After each of the justices has spoken, the justice with the most seniority among those who agree with a particular result will appoint either themselves or one the other justices who agree to draft a written opinion stating that result. The assigned justice(s) will draft an opinion, with the help of their clerks, and then circulate it to the other justices, who give their input.

Eventually, the Court will issue opinions in the case. Usually there is a single majority opinion, which is the ruling in the case that is binding on the parties and serves as a *precedent* that should be followed in future cases. In some cases, the majority opinion is unanimous, agreed to by all the justices. But in other cases, where at least five justices cannot agree on a particular rationale for a ruling, the Court will issue a *plurality* opinion that has the support of the most justices. Sometimes one or more justices will issue a concurring opinion, in which they agree with the end result of the majority's ruling, but disagree with some element of that ruling, such as its rationale or how it applies to the current and future cases. In most cases, in addition to the majority opinion there is also usually one or more minority opinions, known as dissents. While dissents are not biding law, the justice(s) that sign on to a dissent present their own rationales in the hopes that a court in a future case may find those arguments persuasive. In some cases, the Court issues as mixture of opinions in which the justices agree and disagree on various issues, and it can sometimes be difficult to determine the impact of the case as a precedent.

Once the Supreme Court issues a ruling, it is a precedent on the issue(s) decided that is binding on all appeals and trial courts, both state and federal. But lawyers in future cases may argue that the new case and/or the circumstances in which the case arose are significantly different from the applicable precedent(s), so that a new ruling should be made. And that new ruling may be appealed and reach the U.S. Supreme Court, where the Court may agree that the new case or the circumstances are sufficiently different to establish a new precedent, or to require reversal or limiting of the prior precedent. In many cases, the Court will affirm and apply the prior precedent, or simply not grant certiorari in the first place.

As described above, in addition to the Supreme Court reversing one of its prior decisions itself, a Supreme Court decision can also made irrelevant by repealing a contested statute or regulation, or by adopting a new state, regulation or constitutional amendment.

The Federal Court System

Besides the U.S. Supreme Court, there is an entire system of lower courts in the federal court system. The primary ones are the federal district courts, which are the general trial courts, and the circuit courts of appeals. There are also specialized courts for international trade and bankruptcy matters, and for claims against the United States government.

There are also some administrative agency hearings that are deceptively referred to as courts, as described in the Administrative Law section above. But these administrative decisions can usually be appealed to actual courts.

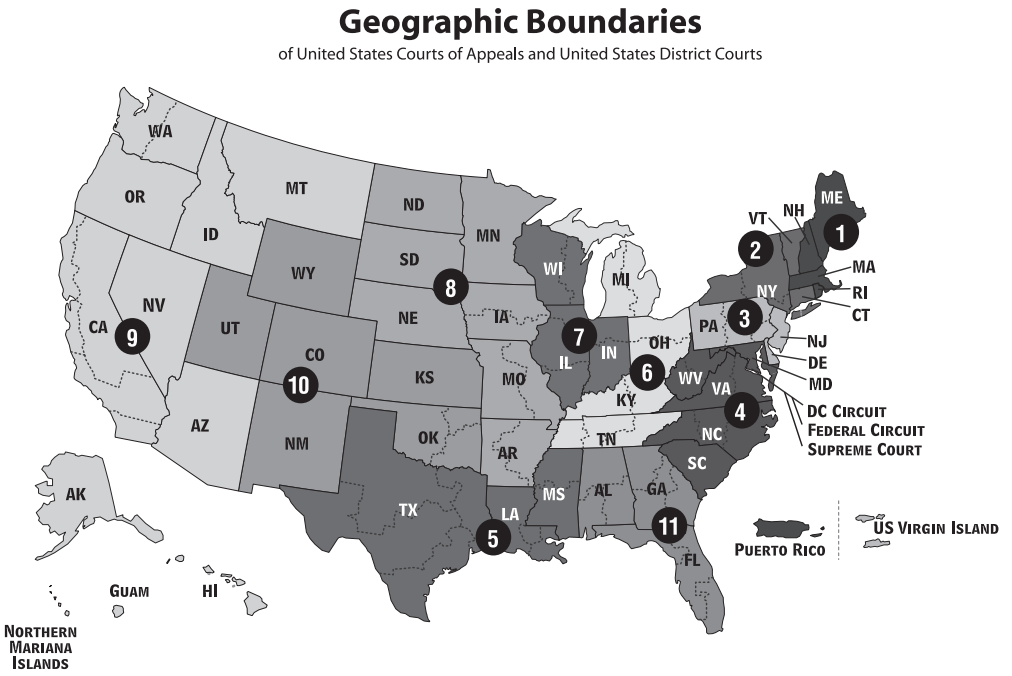


Figure 1.5 Geographic boundaries of the United States district courts and circuit courts of appeals.
Source: Administrative Office of the U.S. Courts.

Federal District Courts

There are 94 federal district courts throughout the United States, with at least one district in each state and territory.[49] In states with smaller populations, such as Montana, the entire state constitutes a single federal district, while large-population states like California have several districts within their state boundaries. There are usually multiple courthouses within each district. Overall, there are 890 active federal judicial positions in federal district and territorial courts.[50]

A case can be brought in a federal district court under one of two conditions: it involves a matter of federal law, such as a federal statute or regulation, or a Constitutional provision, or it involves parties that are residents of two different states (known as *diversity* of the parties) and the amount in controversy is over $75,000. An average of about 280,000 cases are filed in federal courts each year.[51]

The district courts handle both civil and criminal trials, although individual judges may specialize in one or the other. These trials are held before a single judge, and usually before a jury of between six and 12 members, known as a *petit jury*. The defendant in a criminal case has the constitutional right to have the case determined by a jury, although both parties in either a criminal or civil case can agree to hold the trial before the judge alone, without a jury. Almost all district court proceedings are open to the public and the press, although most federal courts have restrictions on use of still and video cameras and recording devices.

The U.S. Courts of Appeals

Rulings and verdicts in federal district courts can be appealed to the next highest level of federal courts, the Circuit Courts of Appeal. There are 13 federal appeals courts, with 12 of these hearing appeals from district courts in particular geographic regions of the United States. One of the regional courts, the Court of Appeals for the District of Columbia Circuit, also hears many appeals of rulings by administrative agencies, because of the presence of many such agencies in the nation's capital. The other federal

circuit court, named the Court of Appeals for the Federal Circuit, hears appeals in patent law cases and in cases against the United States.

The individual circuits vary in geographic size and in the populations in their areas, with the massive Ninth Circuit covering nine western states and two territories, encompassing almost 20 percent of the U.S. population.[52]

Appeals are argued by lawyers before a panel of three judges. There are no witnesses or testimony in appeals courts, only legal arguments alleging some error in the district court proceeding that should be reversed. There are many such possible errors, but one that will frequently appear in the cases in this book is that the trial court should have dismissed the case because it violates the free speech and free press provisions of the First Amendment.

It may take a while for an appeals court panel to issue a verdict. Once it does, the losing party can ask for *en banc* review, in which a larger panel of the appeals court's judges considers whether the initial panel's ruling is incorrect. The court's judges as a whole decide whether the *en banc* review should be granted or denied. If it is granted, the larger panel hears and eventually rules on the lawyers' arguments.

The ruling of the panel—either the *en banc* panel or the initial, three-judge panel if there is no *en banc* review— is usually the final ruling in the case. One or both parties in a case may seek to appeal the ruling further by filing a *certiorari* petition before the U.S. Supreme Court, but as explained above the Supreme Court rarely grants such petitions.

State Court Systems

Besides the federal courts, each state and territory has its own courts. State courts handle the vast majority of legal cases in the United States, with 83.8 million cases filed in state courts in 2018. Just over half of these are traffic violation cases, while criminal and civil cases are each about 20 percent of the total.[53]

While the states' court systems vary, all of them include a basic trial court and a state supreme court (which may be named something other than "Supreme Court"). In some states the same trial court judges preside over both civil and criminal cases, while other states have separate trial courts for these purposes. In some states, there are separate appeals courts for criminal and civil cases. Forty-one states have intermediate appellate courts.[54]

In most states, localities such as counties, cities and towns also have their own courts within their state's court systems. These usually handle minor criminal and civil matters, but sometimes appeals of such "minor" cases eventually make their way to the U.S. Supreme Court.

A Case's Journey

Courts make their rulings in cases, either during interim steps or as final results as a particular case proceeds through the court system. And while the processes by which a particular case moves through the system can be complicated and can differ from case to case, it is possible to give a general outline of the procedure that most cases will follow.

Civil versus Criminal Law

An important initial distinction is whether a case is a civil or criminal case. Criminal cases may be more familiar from movies or television: in these cases, the government alleges that an individual or group of individuals acted in some way that violates the law, and seeks to impose a penalty in the form of a financial fine and/or detention in a jail or prison. In a civil case, meanwhile, a individual or entity alleges that another person or entity has harmed them in some way, and seeks compensation for that injury.

There are important differences in civil and criminal cases, particularly because of the rights of criminal defendants guaranteed in the federal and state constitutions. Also, some of the specifics and names of documents and processes differ. But the overall process is generally similar for both types of cases.

The Civil Lawsuit

Most of the cases we'll look at in this book are civil cases, in which one party seeks financial compensation for an injury allegedly caused by another party. A small share of cases are based on an alleged

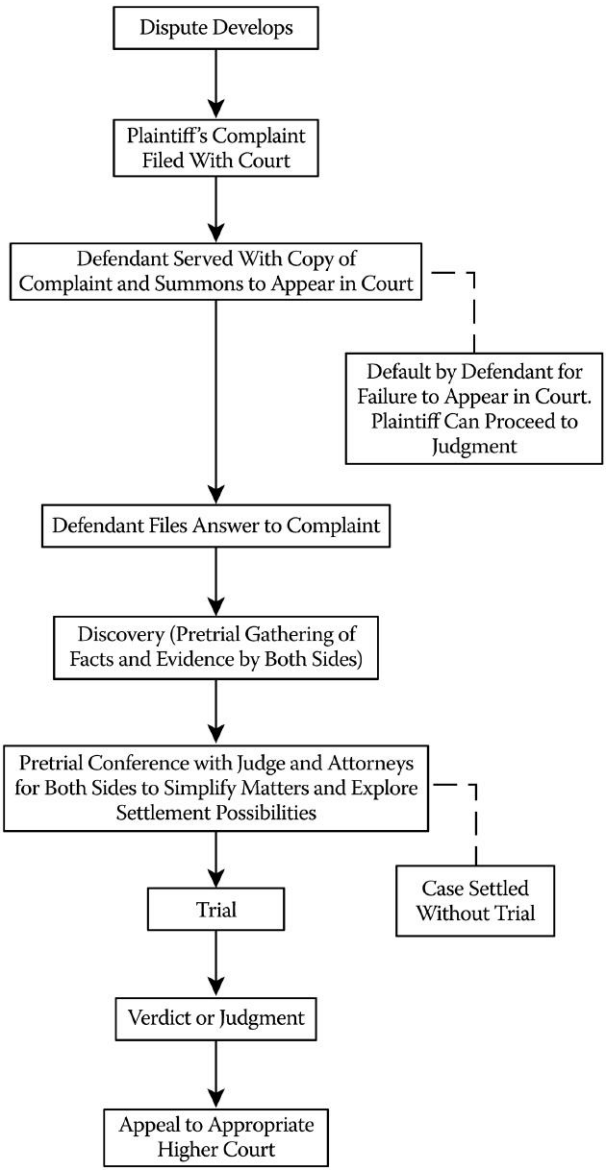


Figure 1.6 The steps of a civil case in Kentucky.

Source: Compiled by Administrative Office of the Courts, Frankfort, KY; reprinted with permission.

injury as a result of an individual's action or inaction, a type of claim known as a *tort*. Only about 4 percent of cases filed in state courts are based on tort claims,[55] with tort claims based on speech representing an even smaller share.

The Complaint

A tort lawsuit begins with the aggrieved party, known as the *plaintiff*, filing a document known as a *complaint* with the appropriate court. In the complaint, the plaintiff gives a basic outline of what the lawsuit is about: what legal claims s/he is making, what injury s/he has allegedly suffered, and what the other party—known as the *defendant*—did or failed to do in order to cause the alleged injury. The plaintiff usually sues for damages, money to compensate for the injury, but can also seek a court order forcing the defendant to do something s/he has failed to do, or to stop doing something that s/he is doing. Even if the plaintiff is seeking damages, at this stage s/he does not always need to specify how much s/he is seeking.

Determining which court a lawsuit should be filed in is sometimes clear, but is sometimes difficult to determine. First of all, to even file the case there has to be an actual *case* or *controversy* that the court can adjudicate: the defendant must have already suffered an alleged injury, since lawsuits are not permitted to stop anticipated injuries before they occur. Second, the court must have the power to decide a case, which is called *jurisdiction*. For example, a federal district court has jurisdiction only if the case involves an issue of federal law or if the case involves parties from different states. A state court will likely have jurisdiction only if the events that led to the alleged injury occurred within that particular state. This is known as *subject matter jurisdiction*.

The U.S. Supreme Court has also held that a court's jurisdiction only extends to individuals and entities who could reasonably expect to be called into a particular court, because they either reside or conduct business in the court's geographic area, or because their conduct has an effect that area. This is known as *personal jurisdiction*, and can be based on even a small amount of contact with the relevant state. So, for example, the Supreme Court held that *Hustler* magazine could be sued in New Hampshire, even though at the time less than 1 percent of its monthly circulation was in the state.[56] But, in a more recent case, the First Circuit Court of Appeals held that the online real estate publication *The Deal* could not be sued in New Hampshire because the only subscriber in the state was Dartmouth College, and there was no record that anyone accessed the articles at issue through that subscription.[57]

Defendant's Response: Motion to Dismiss or Answer

Once a complaint is filed, the defendants are required to respond. Failure to do so is likely to result in a default, in which the failure to respond is considered an admission of liability and the court will proceed to award damages.

The defendant(s) have two options for responding: filing a motion to dismiss or filing a document known as an *answer*.

A motion to dismiss, also known as a *demurrer*, is an argument to the court that one or more of the claims in the complaint is legally deficient, and should therefore be dismissed. There are a number of grounds for such deficiency, including filing with the incorrect court, not having an actual case or controversy, or not adequately alleging the requirements for the claims that are made. Other grounds for dismissal include that the time limit for filing a particular claim—known as the statute of limitations—has expired, or that the plaintiff has not taken the steps necessary in order to file a claim, known as "fulfilling the *conditions precedent*."[58]

The case must also be brought at a time when the issues in the case are current, and the court action can have a practical effect. If a case is brought too early, it is said to not be *ripe*, and will be dismissed on this basis. On the other hand, if the case is brought too late, it will be dismissed on the grounds that it is *moot*. Other bases on which a case can be dismissed at this stage or later include the court's lack of subject matter jurisdiction over the cases, that the case was brought in an improper venue, lack of personal jurisdiction, and insufficiency of service of process.

The defendant can also argue that the plaintiff has not suffered an actual injury, and thus does not have *standing* to bring the lawsuit.

If the defendant is successful in making any of these arguments, the court will dismiss the case. It may do so either *with prejudice*, which means that the case cannot be filed again, or *without prejudice*, which gives the plaintiff(s) the opportunity to revise the complaint in order to overcome the problems. The defendant then must respond to the new complaint.

The defendant's other option is to file an *answer*, in which the defendant responds to the allegations in the complaint. The answer usually does not explain the case in detail from the defendant's perspective, other than admitting or denying the statements in the complaint, line by line.

The answer may also include *counterclaims*, legal claims that the defendant makes against the plaintiff. These counterclaims must meet the same requirements as the original claims, and the plaintiff may make a motion to dismiss one or more of the counterclaims.

Discovery

If any claims and/or counterclaims survive the motions to dismiss, the parties then proceed to a process in which they collect and share evidence relevant to the remaining claims, a process known as *discovery*. Depending on the specifics of the claims and the situation, the discovery process is likely to include: interrogatories (written questions and responses between the parties); requests from lawyers and court-issued subpoenas for production of documents and other physical evidence; and depositions and affidavits (in which individuals reveal information about the case through questioning by the parties' lawyers).

Other information sought by the parties may be privileged, meaning that the law protects that information from disclosure, for some policy reason. For example, communications between a lawyer and a client are privileged and need not be disclosed. Other examples include spousal privilege for communications between people who are married; doctor–patient and psychiatrist–patient privileges; and the priest–penitent privilege for things said in religious confessions. But none of these privileges are absolute and the information may have to be disclosed under some circumstances.

Reporter's Privilege

In some cases, particularly cases with media defendants, media entities and their employees may object to being required to reveal certain information, particularly information that the media have not published or broadcast, or information identifying sources to whom the media have promised anonymity.

Many times journalists who are denied information necessary for stories must rely on confidential informants. Sometimes those sources insist on not being identified in a story before they agree to provide information a reporter is seeking. Some reasons are understandable and easily defensible. A witness to a crime is afraid the perpetrator, who has not been arrested, may try to intimidate or even seek to silence him. A person may fear that exposing a company's policy of reducing production costs by cutting corners and endangering the safety of customers may cost the employee a job. Sometimes the anonymous source may fear the information will result in embarrassment for himself or someone else. But the source's motive also may be indefensible: criticizing an opponent, undermining a policy, providing incorrect information.

In Washington, D.C., government officials at all levels often refuse to be identified in stories and many of those interviews are "off the record" or "on background only." Many times these officials speak to numerous reporters at what appears to be a press conference, except that the event takes place with the understanding that the speaker(s) will not be individually identified. The absurdity of this "unnamed official" practice was never more clearly illustrated than as a result of a 2009 meeting in the White House in which *New York Times* columnist David Brooks met with three Obama administration aides about the health care program the administration was proposing, which eventually became the Affordable Care Act. In the course of the meeting, a fourth "senior member of the administration" walked in on his way to dinner. In his column, Brooks never identified the fourth member, who it

was later revealed was the president himself. Clark Hoyt, then the *New York Times* public editor, wrote about the encounter. "I asked Brooks if he had asked the president to go on the record. He said he had not, because 'I thought in those informal circumstances it would be wrong to quote him by name.'"[59] This practice actually has a long history. President Calvin Coolidge, who became president upon the death of Warren G. Harding in 1923 and was elected to his own term a year later, spoke to the press frequently but required questions to be presented in writing in advance, and for reporters to not identify him as their source. He was often described as a "White House spokesman" or a "source close to the president."[60]

Most unidentified sources used in stories datelined from Washington never become an issue. But, especially in stories related to national security issues, recent administrations have taken dramatic steps to identify the government officials who were the source of information that was classified. When government secrets are exposed, whether the information actually endangers national security or embarrasses a public official, the government may go after the "leaker" by subpoenaing the reporter before a grand jury or a judge. At that point, the fight is on, and the judge may threaten the reporter with contempt and a trip to jail if she refuses to divulge the name of her anonymous source.

The U.S. Supreme Court addressed this issue in *Branzburg v. Hayes* (1972).[61] The case was a consolidation of three separate cases in which reporters refused to disclose sources of articles they had published about illegal activities: planning by the militant African American group the Black Panthers in Massachusetts and California; and the manufacturing of illicit drugs in Kentucky.

The sole question before the Court, according to the majority opinion written by Justice Byron White, was "the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime."[62] Justice White's opinion identified what he saw as the main argument in favor of a reporter's privilege. "The heart of the claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information."[63]

In a five-to-four decision, the Court rejected the claim identified by White and ruled the First Amendment freedom of the press did not include the right of reporters to refuse to appear before a grand jury and answer questions about criminal activity they had witnessed. The majority held that the public's interest in law enforcement outweighed the concerns of the press.[64]

Figure 1.7 *New York Times* reporter Earl Caldwell's refusal to identify confidential sources for his stories on the Black Panthers was one of the legal cases consolidated in the U.S. Supreme Court's *Branzburg v. Hayes* decision.

Source: Bettmann/Getty Images.

Justice Lewis Powell, while subscribing to the majority opinion, wrote a concurring opinion to emphasize what he believed was "the limited nature of the ruling." He suggested that there may be circumstances under which the First Amendment protects reporters from having to reveal confidential sources, and that judges who review reporters' motions to quash grand jury subpoenas should balance freedom of the press against the obligation of all citizens to testify before a grand jury.[65] Later, Powell, dissenting in another case in 1974, commented that the *Branzburg* ruling did not leave reporters without First Amendment rights to protect the identities of their sources.[66]

The dissenters broke into two sides. Justice William O. Douglas insisted that the First Amendment provided reporters with an absolute and unqualified privilege to protect sources.[67] The others—Justices Stewart, William Brennan, and Thurgood Marshall—argued in an opinion written by Stewart that the Court was going to impose a governmental function on the media,[68] an argument Justice Powell disputed in his concurrence.[69]

In his dissent, Stewart proposed a three-part test. Under it, the government would have to prove all three of these conditions or reporters would be allowed to protect the identities of their confidential sources:

- A probable cause exists that the reporter has information clearly relevant to a specific crime.
- The information sought cannot be obtained by alternative means less destructive of First Amendment rights.
- The state has a compelling and overriding interest in the information.[70]

The press organized to reject the result in *Branzburg*, and has been somewhat successful. According to media law scholar Jane Kirtley, director of the Silha Center for the Study of Media Ethics and Law at the University of Minnesota, "thanks to the hard work and persuasive powers of a cadre of media lawyers, many courts interpreted this decision as recognizing at least a qualified privilege in other situations."[71]

After the *Branzburg* ruling, the press lobbied state legislatures to pass *reporter's shield laws*, which gave journalists some measure of protection from having to reveal confidential sources when requested by a court. (A few states had already passed such laws prior to the *Branzburg* decision.[72]) Today, 40 states and the District of Columbia have enacted such laws.[73] In ten other states without a statute, the courts have recognized such a privilege to some extent.[74] Two states—Hawaii and Wyoming—do not recognize any sort of privilege.[75] Among the states that do recognize the privilege, the level of protection given to reporters varies, from near-absolute protection—requiring disclosure only when there is no other possible source of the information—to policies that provide only qualified protection and include several exceptions.

Several of the statutes and court rulings use a test similar to the one suggested by Stewart in his dissent in *Branzburg* to determine whether a reporter should have to reveal confidential sources. The Minnesota Supreme Court applied such an analysis in ruling that the state shield law did not prevent a trial court from fining Wally Wakefield when he refused to disclose the identity of anonymous sources that had made comments disparaging a former high school football coach, who was suing Wakefield for libel.[76]

The situation is a bit different when the request to a journalist for information comes from a federal court. There is no federal shield law, despite several attempts to pass such a law. As a result, federal courts are bound by the *Branzburg* ruling that there is no such privilege required by the First Amendment in criminal cases. But several of the circuit federal appeals courts have seized on Justice Powell's concurring opinion in *Branzburg* to hold that there is a reporter's privilege in cases whose circumstances differ from that case. The First, Second, Third, Ninth, Tenth and Eleventh Circuit Court of Appeals have ruled that the First Amendment provides a reporter's privilege in civil cases, and in some criminal ones. The Fourth, Fifth and District of Columbia Circuits have held that there is a privilege only in civil cases. And the Sixth, Seventh and Eighth Circuit courts have held that there is no privilege in any sort of case.[77]

In addition to the appeals courts' rulings, the Department of Justice adopted guidelines in 1980 that provide that a subpoena to the press should only be used as a last resort, when the information is available nowhere else, that prosecutors should try to negotiate with the press before issuing a subpoena for information, and that any subpoena to the media must be approved by the Attorney General.[78] The rules were strengthened in 2014 and 2015 after the James Risen situation described below and other cases in which the government was said to have skirted the requirements of this rule. Bruce Brown, the executive director of the Reporters Committee for Freedom of the Press, said the revisions "reflect a significant change in direction for this attorney general (Eric Holder) as he leaves office."[79] Nevertheless, the issue of the government subpeonaing records to reveal reporters' confidential sources arose again in the last months of the Trump administration and the start of the Biden administration.

This leaves the question of whether a particular reporter will be compelled to reveal confidential sources—or be jailed for contempt of court for failing to do so—a bit murky, depending on the particular court in which the reporter's information is sought.

Reporters generally refuse to disclose the identity of sources to whom they pledged anonymity, often even when a court orders them to do so. For many journalists, this is an ethical issue more than a legal one, because they gave their word. "If there is a bedrock principle among journalists, it is that a commitment to a source's anonymity must be honored at all costs."[80] In their survey of American journalists, David H. Weaver and his collaborators found in their surveys that "less than 10% of the journalists said that divulging the name of an anonymous source could be justified."[81]

Besides the ethical considerations, revealing a confidential source can also possibly lead to legal liability. During the 1982 Minnesota gubernatorial race, an operative for one of the candidates gave reporters for two newspapers a tip that the opposing candidate had been criminally charged with unlawful assembly and convicted of petit theft when she was in her 20s. It turned out that the unlawful assembly charges stemmed from a protest, and the charges were eventually dismissed. The petit theft conviction was for leaving a store without paying for $6 worth of sewing materials, and the conviction was later vacated. Both reporters decided that the fact that the campaign was releasing this information was more newsworthy than the information itself, and they both identified the campaign operative even though both had promised him anonymity. The source, who was fired from the campaign after the revelation, then sued the reporters for breaking their promise, and the U.S. Supreme Court held in *Cohen v. Cowles Media Co*. (1991) that he had a valid claim that was not barred by the First Amendment.[82]

The battle between journalists and governments dates to the colonial period, when James Franklin, publisher of the *New England Courant* and the older brother of Benjamin Franklin, spent a month in prison in 1722 for refusing to identify the author of an article critical of the Massachusetts royal government.[83] In 1848, John Nugent, a reporter who covered the United States Senate for the *New York Herald*, was held in contempt of the Senate and held in custody for 30 days after he refused to explain how he had obtained a secret copy of a proposed treaty that would end the Mexican–American War.[84]

Perhaps the most famous example of a confidential source was "Deep Throat," who guided *Washington Post* reporters Bob Woodward and Carl Bernstein in their investigation of the burglary of the Democratic National Headquarters in the Watergate Hotel and the subsequent cover-up that eventually resulted in the resignation of President Richard Nixon in 1974 as Congress was preparing to impeach him. Despite pressure on the *Washington Post* from Congress and others, and years of inquiries and speculations, no court action was taken against Woodward and Bernstein seeking to identify their source. In fact, Deep Throat's identity was not revealed until three decades later, when Mark Felt, former deputy director of the FBI, unmasked himself in an article in *Vanity Fair* in June 2005, having been persuaded by his family.[85]

More recently, *New York Times* reporter Judith Miller was jailed for 85 days in 2005 for refusing to disclose who had revealed to her that the wife of a critic of President George W. Bush was a CIA agent, a disclosure that was illegal; she was released only after the source agreed to be identified. Freelance

blogger Josh Wolf spent 266 days in jail—a record—after he refused to give federal investigators unreleased footage that he had taken of a 2005 anarchist rally. He was released when he arranged to post the footage online, where prosecutors could access it. Other journalists have been threatened with jail in other cases, but avoided incarceration when prosecutors dropped their requests.

Many requests for journalists' sources are abandoned when the information is obtained some other way. This not only shows that the requests may not have been as urgent as prosecutors initially portrayed them, but also shows that increasing surveillance technology is increasingly making such demands unnecessary. For example, the Justice Department initially sought to force *New York Times* reporter James Risen to identify his source for his stories on the CIA's scheme to give Iran a flawed design in order to thwart that country's development of nuclear weapons, but dropped the effort in 2011 after it was able to obtain Risen's telephone records from his cell phone provider, without any notice to Risen.[86] Risen saw this as a threat to journalism. "I plan to spend the rest of my life fighting to undo damage done to press freedom in the United States by Barack Obama and Eric Holder," he tweeted on February 18, 2015. "The Obama administration is the greatest enemy of press freedom in a generation."[87]

Other questions have arisen over who is a journalist entitled to claim the privilege. This was an issue in the Josh Wolf case, since he was a freelance blogger who had sold some of his footage to local television stations but was not steadily employed by a news organization. Some courts have had to rule whether bloggers are journalists so that states' reporter's privilege statutes apply to them.[88] Another issue in the Wolf case, and in other more recent cases, is whether the privileges apply to information other than the identity of sources, such as unpublished materials, photographs and reporters' notes.

Reporter's shield laws have also been used in some cases by websites seeking to protect the identities of anonymous posters and commenters.[89]

Five decades after *Branzburg*, it is clear that reporters should consider carefully any request from a source who wants to provide information confidentially. Information that could be construed as damaging someone's reputation or related to criminal activity can lead a reporter to an unpleasant choice: go to jail or break a promise and reveal a source.

Newsroom Searches

Besides subpoenaing journalists to testify in order to obtain information, prosecutors and others have sought search warrants to enter and search news organizations' offices to obtain evidence. The U.S. Supreme Court held that such searches were not barred by the First Amendment in *Zurcher v. Stanford Daily* (1978), which challenged a police search of the newspaper's offices for unpublished material relevant to a criminal case.[90]

As with the court's ruling in *Branzburg*, the *Zurcher* ruling led the media industry to lobby Congress for a legislative solution. The result is a provision of the Privacy Protection Act of 1980, which generally requires investigators seeking information from the media to use the subpoena process, described above, rather than obtaining a search warrant.[91]

Summary Judgment

Once discovery is entirely or substantially complete, either party may make a motion for summary judgment, arguing that the judge should decide the case on the basis of just the evidence revealed during discovery. The plaintiff will usually argue that the evidence clearly shows that s/he has proved the case as a legal matter. The defendant, on the other hand, will claim that the evidence clearly favors his/her arguments. In arguing for summary judgment, the party or parties seeking it must also argue that there are no substantial factual questions that need to be resolved by a jury. If the judge agrees, the judge may issue summary judgment on one or more claims, or even dismiss the entire case.

In fact, the U.S. Supreme Court has held that summary judgment is favored in cases involving First Amendment free speech issues, because of the "chilling effect" that the threat of litigation can have on speech.[92]

Pretrial Motions and Hearings

As discovery proceeds, the parties may have disputes over whether particular evidence can be used in court, as well as other issues such as a party's claim that the case has received enough attention that any jurors will be tainted by the pretrial publicity and have formed an opinion about the case before trial. If the judge agrees, the case may be moved to another court—another *venue*—that is located where such a bias is less likely.

These issues are usually addressed in motions filed with the court and/or at hearings held in court prior to the trial. In these proceedings the judge may also pressure the parties to settle the case so that it can be resolved without the time and expense of a trial. In some states, settlement talks or attempts to resolve the dispute before an arbitrator is a required step.

The Civil Trial

After discovery is completed, and all pretrial issues and motions are resolved without the case being dismissed, the case is ready for trial. The vast majority of cases, for one reason or another, do not make it to the trial stage. And it is not unusual for at least one *continuance* or postponement to occur before a trial begins.

Jury Selection

As explained above, not all trials occur with juries. But if a case is to be heard by a jury, the first step in the trial process is selection of the jurors who will hear the case. Potential jurors are instructed to report for *jury duty*, and are asked come to the courthouse on a designated day. Then a random group of individuals from the *jury pool* will be sent to a particular courtroom, where they become possible jurors—known as the *venire*—who will be questioned by the lawyers to determine their suitability to serve as jurors in the particular case. This process of questioning is known as *voir dire*. Questions may include the potential juror's background and experiences; whether s/he knows any of the parties, witnesses or others involved in the case; and whether the potential juror can make an objective determination of the facts. If a lawyer perceives that a potential juror is biased or cannot dispassionately make a ruling in the case, the lawyer may seek to have the juror excluded "for cause." The lawyers may also seek exclusion of a potential juror without disclosing a specific reason, known as a *peremptory challenge*. The judge will usually accede to the lawyers' requests, but the lawyers may not exclude potential jurors solely on the basis of race or gender.

Increasingly, lawyers now investigate a potential juror's social media and other online activities in order to detect a potential bias. While there has been some controversy over this practice, it is generally now considered a lawyer's ethical duty to undertake such research, as long the information is generally accessible to users of the social media platform.[93]

Jurors, on the other hand, are usually instructed to not access information about the trial, or to communicate with each other or with other trial participants via social media or more traditional means. They are also asked to not comment on social media or elsewhere about the case before it has concluded, and to not conduct any of their own research about the case. Despite such admonitions, there have been numerous cases in recent years in which jurors and other trial participants have posted or commented about trials online. In such situations, the judge and lawyers must evaluate the extent to which the trial has been tainted, and may end up removing a juror from the case or even declare a mistrial, in which the case must be tried again.

In some cases, jurors may be sequestered: they are kept together for the duration of the trial, usually in a local hotel, and their access to media is controlled to avoid any prejudicial news about the case. It is increasingly rare to sequester a jury throughout a trial, although the jury may be sequestered for the duration of deliberations.

Ethical Concerns in Covering Juries

The U.S. Supreme Court unanimously held in 1984 that there was a "presumptive openness" in *voir dire* so that the press and the public had a constitutional right to attend, except in rare circumstances.[94]

Thus journalists frequently cover jury selection, especially in cases with strong public interest. In doing so, journalists should always give careful thought to the ethical dimensions of covering this process.

One of the ethical concerns facing journalists is whether to publish names and other personal information about jurors, including potentially embarrassing facts that may have been disclosed during *voir dire*. Some jurisdictions now allow judges, under certain circumstances, to issue gag orders that forbid publication of names and other information about jurors. Although such orders could, in most situations, be overturned as a violation of the First Amendment, media outlets usually choose not to contest them, particularly when individual jurors might be adversely affected by disclosure.

Like the lawyers in a case, reporters may also research the jurors and other trial participants online, including on social media. This is generally acceptable, as long as the information accessed is what is generally available to site users. But it would be problematic for journalists to "friend" or connect with the trial participants, particularly the jurors, in order to access information not generally available.

In rare cases such as when a trial is likely to attract a lot of media attention or when a notorious or well-known figure is on trial, judges may order that jurors' identities be kept secret. That was the case in the high-profile O.J. Simpson and Susan Smith murder trials in 1995. But these restrictions only last for as long as the individual jurors are involved in the trial. When several jurors were dismissed in the O.J. Simpson case, each one held press conferences and one even wrote a book about his experience on the jury. Several jurors in the Smith case also spoke out after the trial ended.

Opening Statements and Burden of Proof

A trial begins with opening statements by each side. The party with the burden of proof—the one that has the obligation to prove the relevant facts in a case—goes first. In a civil trial, this is the plaintiff's attorney; in a criminal trial, it is the prosecutor. Over the course of the trial, the party that has this burden must prove that the requirements of the legal claims (or charges, in a criminal case) are met.

In a civil suit, the plaintiff has the burden of proving that the requirements of the claim(s) being made actually occurred.[95] For most torts, plaintiff must do so to the standard of proof of "a preponderance of the evidence," although occasionally other standards such as "clear and convincing evidence" apply. In a criminal case, a prosecutor must prove "beyond a reasonable doubt" that the necessary elements of the particular crime or crimes with which the defendant is charged were present. Of these standards, "preponderance of the evidence" is a lower evidentiary standard than "clear and convincing evidence," which is a lower standard than "beyond a reasonable doubt."

Under the civil and criminal rules of evidence, opening statements cannot be argumentative and must be confined to the facts that each side intends to prove at trial. While they are optional, it is rare for an attorney not to make an opening statement. Many lawyers believe that most jurors have made up their minds by the end of the opening statements; this has been bolstered by a few scientific studies reaching this conclusion.

Presentation of Evidence

After each side has presented an opening statement, the heart and soul of the trial—the presentation of evidence—begins. Opening statements may have an impact on the trial, but the evidence is the core of any trial, and is what the jury or judge weighs in reaching a verdict.

The rules of evidence, both criminal and civil, are enormously complex. These rules control not only *what kinds of* evidence can be presented, but also *how* evidence can be presented. The rules are particularly complex regarding *hearsay*, which is basically second-hand information, that is, information based on communication from a third party, not on personal knowledge. While hearsay is generally not admissible as evidence, there are many exceptions. In fact, the Federal Rules of Evidence specifically cite 23 exceptions, including a catch-all "other" category.[96]

Evidence in a trial includes *direct evidence*, which directly proves a fact without having to be tied to other facts or presumptions, and *indirect evidence*, also known as *circumstantial evidence*. The best examples of direct evidence are oral testimony from an eyewitness, a confession (in a criminal case), an admission

(in a civil or criminal case), and a murder weapon. Indirect evidence consists of facts that must be proven by inference or by implication. In an invasion of privacy suit, for example, receipts showing the defendant had purchased equipment that could be used to secretly record a phone conversation would be an example of indirect evidence.

Evidence is presented in a trial through *oral testimony of witnesses* and *exhibits*, including documents. Witnesses are called by one party or the other, with that party's attorney asking the witness questions first during *direct examination*, followed by the other party's attorney conducting *cross examination* of that witness. In direct examination, questions are to be direct and not presume an answer, while during cross examination it is expected that the lawyer will use leading questions that are meant to make the witness give testimony favorable to the side of the questioning attorney and to *impeach* or destroy the credibility (not just the content) of the witness's testimony.

During the direct and cross examination, the opposing counsel can always object when impermissible questions are asked or irrelevant evidence is sought. The judge then rules on the objection. If the judge overrules the objection, the witness is allowed to answer the question, but the judge's ruling may be the basis for an appeal if an unfavorable verdict is rendered. If the judge sustains the objection, the attorney may either rephrase the question or start another line of questioning.

After a witness has been directly examined by the attorney who called him or her and then cross examined by the attorney for the other side, the attorney who called can then conduct a redirect examination, followed by a recross examination by the other side. The recross can then be followed by another redirect and so on, but such exchanges are rare, and the judge has the authority to end the process when deemed appropriate.

Expert Witnesses

The process is slightly different for expert witnesses, who are hired to offer their opinions on a particular aspect of the case. Expert witnesses must be qualified to testify on a particular issue, and must possess special skills and/or knowledge gained through specialized experience and/or training. For example, a professor of journalism may be hired in a libel case by the defendant to testify that the reporter did not violate journalistic standards and was not negligent in publishing the information at issue.

A key distinction between the testimony of expert witnesses and other witnesses is that a lay witness must have personal knowledge of the matter on which he or she is testifying, but an expert witness does not have to possess such knowledge. Instead, expert witnesses may rely on facts and data beyond any personal observations.

Role of the Judge

The judge plays a major role in the conduct of any trial, including ruling on whether a particular piece of evidence is admissible under the federal or state rules of evidence. The difficulty is assuring that jurors do not hear inadmissible evidence. However, all too often, the inadmissible evidence is heard by the jury anyway because the other side is unable to object until after the fact. The judge must then admonish the jury to disregard the inadmissible evidence.

Motion for Directed Verdict

Once the plaintiff or state (in a criminal suit) has rested its case after calling all of its witnesses, who have also been cross examined, and so on, the defendant can (and usually does) make a motion for a directed verdict. In a criminal case, however, it is usually a motion to dismiss because acquittal in a criminal case either by a judge or a jury is final and the case cannot be retried.

If the judge in a civil case determines *before* the jury renders a verdict that there is either (1) insufficient evidence for a case to go to the jury or (2) the evidence is so compelling that any reasonable person would clearly find for the plaintiff, the judge will issue a directed verdict. A directed verdict can be in favor of either the defendant or the plaintiff. If the evidence is sufficiently weak so there is no question of fact for the jury to decide, the directed verdict will be for the defendant. If the evidence

is so compelling that there is also no question of fact for the jury, the directed verdict will be in favor of the plaintiff.

The request for a directed verdict may first be made by the defendant right after the plaintiff or state has rested its case: before the defendant has ever presented its side. But if the plaintiff's or state's evidence is so weak that reasonable minds would not differ, the judge can obviously rule for the defendant because there is so little evidence for the defendant to counter anyway. A plaintiff may seek a directed verdict only after the defendant presents his/her case.

But in either case it occurs before the jury deliberates and announces a verdict. This means that if a directed verdict is overturned on appeal, there must be an entirely new trial because there is no verdict in the case.

Assuming no directed verdict is granted in favor of the defendant after the plaintiff or state (in a criminal case) has presented all of its witnesses and evidence, the defendant then presents its witnesses and evidence. The process is exactly the same as for the plaintiff except that the defendant conducts a direct examination of each witness, followed by the plaintiff's cross examination, the defendant's redirect (if exercised), and so on.

Closing Arguments

In both civil and criminal cases, the trial ends with closing arguments by both sides. While the opening statements are summaries of the facts to be presented, the closing comments can, and indeed nearly always are, arguments designed to sway the jury to a particular side. These arguments can often be personal and emotional, as in the following excerpts from the closing arguments made by the plaintiff's attorney in a libel suit discussed in Chapter 4:

> Since he talked with you about the University of Georgia and when he was there, I think I likewise have a right to mention to you briefly that I probably have known Wally Butts longer than any man in this case. I was at Mercer University with Wally Butts when he played end on the football team there. He was in some respects a small man in stature, but he had more determination and more power to win than any man that I have ever seen in my life. I would not stand before you in this case today arguing in his behalf if I thought that Wally Butts would not tell you the truth when he raises his hand on this stand and swears to Almighty God that what he is going to tell you is the truth. ...
>
> Somebody has got to stop them. There is no law against it, and the only way that type of, as I call it, yellow journalism can be stopped is to let the *Saturday Evening Post* know that it is not going to get away with it today, tomorrow, or anymore hereafter and the only way that lesson can be brought home to them, Gentlemen, is to hit them where it hurts them, and the only thing they know is money. They write about human beings; they kill him, his wife, his three lovely daughters. What do they care?
>
> I say, Gentlemen, this is the time we have got to get them. A hundred million dollars in advertising, would ten per cent of that be fair to Wally Butts for what they have done to him?
>
> You know, one of these days, like everyone else must come to, Wallace Butts is going to pass on. No one can bother him then. The *Saturday Evening Pos*t can't get at him then. And unless I miss my guess, they will put Wallace Butts in a red coffin with a black lid, and he will have a football in his hands, and his epitaph will read something like this: "Glory, Glory to old Georgia."[97]

Judge's Instructions to the Jury

After closing arguments, the judge instructs the jury on the appropriate law to be applied in deciding the case. In most jurisdictions, including the federal system, the attorneys for both sides have the opportunity to submit to the judge proposed instructions for the jury, which the judge selects from before the closing arguments are made. Under Rule 51 of the Federal Rules of Civil Procedure and most state rules, the judge can instruct the jury before or after the closing arguments ("close of the evidence") or both, although judges usually follow the tradition of waiting until the arguments conclude. In complex cases, these instructions can be long, complicated and intensely boring.

These days most jury instructions include an admonition to not discuss the case with anyone but fellow jurors, including online and on social media; and to avoid media coverage or commentary about the case, including online.

Jury Deliberations

Once the jury instructions have concluded, the members go behind closed doors to deliberate. First they select a foreperson to direct the deliberations, then usually take a tentative vote on the verdict by secret ballot. If a unanimous verdict is required—often it is not—and the vote is unanimous with no undecideds on the first ballot, the jury returns to the courtroom to announce its verdict. Generally, however, the first vote will not be definitive and deliberations will last from a few hours to days and even weeks. In criminal cases in both federal and state courts, a unanimous verdict is required. In the federal courts and most state courts, civil cases require a unanimous verdict unless the two sides have agreed otherwise before the trial.

In most cases, the same jurors serve throughout a trial through deliberations, but in rare instances substitutions may have to be made. In the highly publicized 1993 Los Angeles trial in which two defendants were charged with beating Reginald Denny during the 1992 L.A. riots, five of the original 12 jurors were replaced. Two became ill during testimony and were dismissed, one was removed for discussing the case with neighbors, and two were taken off the jury during deliberations. One of the latter was a woman about whom the other jurors sent a note to the judge indicating they could not work with her.[98]

If the jury is unable to reach a verdict (for example, if it is unable to reach a unanimous verdict when required), the jury will inform the judge. Often the judge will then admonish the jurors to try again to reach a verdict. But if the judge sees that the jurors are irreversibly deadlocked, it is a *hung* jury and the judge will likely declare a *mistrial*. Mistrials are relatively rare in civil cases, but they do occasionally occur in criminal cases.

Settlements

The majority of criminal and civil cases never go to trial. While there are many reasons for this, it is often because a settlement agreement is reached between the two sides beforehand or at some other point in the case, or the case is resolved some other way, such as arbitration. Studies of end results in civil cases in federal court have found that about two-thirds end with a settlement.[99]

The Verdict

Once the requisite number of jurors agree, they inform the judge, who in turn informs the parties. They all then reassemble in the courtroom, where the verdict is announced. In a criminal case, of course, the verdict is whether the defendant is guilty or not guilty of the charge(s). It is possible for the jury to decide on a guilty verdict on some charges against the defendant, and a not guilty verdict for other charges in the case. In a civil case, there are three major types of verdicts, one of which is chosen by the judge and the parties in formulating the jury instructions: a *general verdict*, in which the jury applies the law to the facts and determines which side wins and the amount of damages or other relief that should be awarded; a *special verdict*, in which the jury makes specific findings of fact, usually by answering a series of written questions, and the judge then applies the appropriate law to the jury's findings to render the final verdict; and a *general verdict with answers to written questions*, which combines a general verdict from the jury with special verdicts on one or more factual issues. If the verdict and answers are at odds, the judge can either send the case back to the jury for further consideration or grant a new trial.

Once a verdict is announced, it is extremely rare for the judge to *impeach* the verdict, or inquire about the secret jury deliberations. But a judge may conduct an inquiry into a verdict if there are serious allegations that extraneous prejudicial information was improperly brought to the jury's attention; an outside influence was improperly brought to bear on any juror; or a mistake was made in entering the verdict on the verdict form.[100] But in a 2017 decision, the U.S. Supreme Court held that a new trial is warranted when a juror expresses a clear racial or ethnic bias.[101]

In most states, but not in the federal courts, only external evidence, not juror testimony, may be used to impeach a verdict. This is known as the "Mansfield rule." A few states adhere to the "Iowa rule," under which jurors can testify regarding overt acts, but not opinions, of other members.

Damages and Other Remedies

Plaintiffs can seek and juries can award various types of damages. *Compensatory damages*, also known as *actual damages*, are meant to compensate the plaintiff for their financial damages and their injuries, including emotional injuries. *Punitive damages* are meant to punish the defendant and deter the defendant and others from doing the harmful behavior. *Exemplary damages* are also imposed to punish the defendant, but also to reward the plaintiff above and beyond the compensatory damages amount. And *nominal damages* are a token amount, usually a dollar, which indicates that the defendant acted improperly but did not seriously harm the plaintiff.

Unless there are applicable statutory limits, the jury has considerable discretion and leeway in determining damages in rendering a general verdict. However, in nearly all cases the judge has the authority to increase or decrease the amount of damages awarded by the jury and even to modify the judgment in other ways before the final judgment is actually entered. A judge's reduction in a jury award is called *remittitur*. For example, when actress and comedienne Carol Burnett was awarded $1.6 million in 1981 by a California jury for libel against the *National Enquirer*, the judge remitted (cut) the total to $800,000.[102] In a more dramatic example, a jury award of $3,000 in compensatory damages and $5.5 million in punitive damages for Food Lion supermarkets against broadcaster ABC was modified to reduce the punitive award to $315,000. Later, an appeals court reduced the total damages to two dollars: one dollar each for two of the original claims.[103]

Debriefing Jurors

While jurors are prohibited from discussing a case while a trial is in progress, they are free to talk once they have rendered a verdict and the trial is over or otherwise concluded. In general, a journalist or anyone else can debrief a juror with that person's consent. Many news media outlets now routinely interview jurors when a trial is concluded to ascertain how the decision was reached and what factors influenced the jurors. The lawyers in a case often also do this.

Jurors are sometimes reluctant to discuss cases, especially because they were ordered not to do so while the trial was in session. However, a thoughtful and enterprising reporter can usually make such former jurors feel at ease and thus get an important "inside" story that helps readers better understand the verdict. Judges sometimes issue bans prohibiting post-verdict contacts with jurors by journalists, but whether such bans are constitutional is an open question. News media threats to oppose such bans in court usually discourage judges from imposing such orders.

Judgment Notwithstanding the Verdict

After the jury's verdict is announced, either party may make a motion for *judgment notwithstanding the verdict* (also called *non obstante veredicto* or *jnov*). The standard for granting jnov is the same as for granting a directed verdict: that there is either (1) insufficient evidence to support the jury's verdict or (2) the evidence is so compelling that the jury's verdict is unreasonable.

If a directed verdict and a jnov are granted on the same basis, then why would a judge wait until a jury had rendered its verdict before issuing a jnov? The answer is that many judges prefer to allow the jury to deliberate even though they know they would overturn a verdict if the jury did not decide in favor of the *correct* party for whom the judge would issue the directed verdict.

There are two major reasons for this preference. First, the jury may very well decide in favor of the correct side, thus negating the need for a jnov. The typical juror feels frustration and, perhaps, anger when he or she returns from a recess—after hearing the plaintiff (or state) present its side or hearing both sides in a civil suit when the directed verdict is in favor of the plaintiff—and is dismissed because the jury has no need to deliberate. Second, the odds of a directed verdict being overturned by an appellate court are typically much higher than for a jnov. In fact, even if a jnov is

overturned on appeal, all the appellate court must do is reinstate the jury's decision. If a directed verdict is overturned on appeal, there is no jury verdict to reinstate and thus a new trial will be necessary.

A jury may never know that a jnov overturning its verdict has been issued because there is a period—usually ten to 20 days after the jury's verdict—during which the motion can be filed, and the judge has some time to consider whether to grant the motion. Unless the judge's decision is reported in the media, the jurors will likely never learn their decision was overruled. The federal courts and most state courts do not allow a jnov unless the side requesting it has previously made a motion for a directed verdict at the appropriate time.

Final Judgment

Although the jury may have come and gone, its decision is not final until the judge enters a judgment on the decision, which may come a few or even several days after the verdict is announced. Any specified deadlines for filing any post-judgment motions or appeals do not begin to run until the judgment is entered.

Post-judgment motions may include motions for a *judgment notwithstanding the verdict* (jnov) or a *directed verdict*, both discussed earlier in this chapter, as well as motions regarding enforcement of the judgment via measures such as garnishments and property liens.

Retrials

If there is a mistrial, that usually means that a new trial—a *retrial*—will be held. The court can also order a new trial because of substantive procedural errors, but such decisions are unusual in both civil and criminal cases.

Although the Sixth Amendment bans *double jeopardy*, trial on the same criminal offense twice, it does not apply to civil cases, and there is no double jeopardy in a mistrial in a criminal case because no verdict has been rendered. However, if a defendant in a criminal suit is acquitted, the decision is final, and the defendant cannot be tried again for that same crime. However, if an individual has been acquitted of a federal crime but the same facts and circumstances support a trial on state charges, the person could face trial in state court. No double jeopardy arises because the two alleged crimes are not the same even though the facts surrounding them are similar or even identical. The same would hold true if the acquittal were on state charges but the facts supported federal charges.

The judge always has the option in a criminal case of either granting an acquittal or a directed verdict, of course, before the case goes to the jury. In this case, the judge must be convinced that a guilty verdict cannot be reasonably supported by the facts.

The Criminal Trial

The procedures and proceedings in a civil trial and a criminal trial are similar, but there are several differences. First, the pretrial procedures in criminal cases are substantially different, primarily because various constitutional rights come into play, such as the Fifth Amendment right of due process and the Sixth Amendment right to a speedy and public trial. There are differences among criminal cases based on the seriousness of the crime charged. Felonies such as murder and rape are major crimes that are generally punishable by imprisonment of more than one year; misdemeanors are less serious crimes like petty theft and creating a public disturbance that are generally punishable by a jail sentence of less than one year, or by probation or community service; and violations, like most traffic tickets, can result in a fine.

Initiating a Criminal Case

There are three major ways in which criminal charges are brought against an individual or legal entity such as a corporation. First, a grand jury can issue an *indictment*, which is a finding that there is sufficient evidence—defined as *probable cause*—to justify holding a trial. The second method by which criminal charges can be brought is *filing of an information* by a prosecutor, such as a district or county attorney,

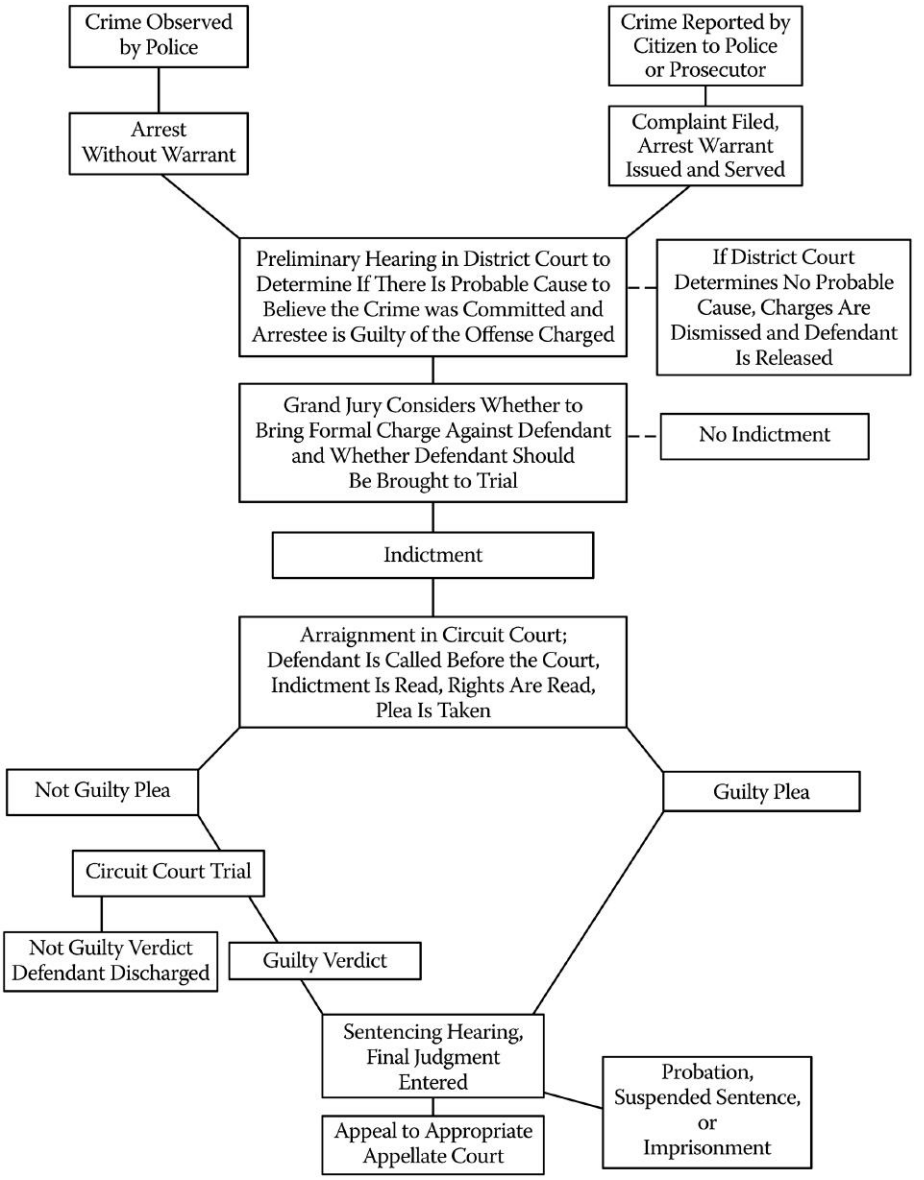


Figure 1.8 The steps of a felony criminal case in Kentucky.

Source: Compiled by Administrative Office of the Courts, Frankfort, KY; reprinted with permission.

without first presenting the case to a grand jury. Finally, for certain misdemeanors and other relatively minor crimes such as traffic violations, but *not* felonies, charges can be brought via a *citation* from a law enforcement or other designated officer.

Grand Jury Indictments

The grand jury system has a long bloodline that goes back nine centuries to England and continued through colonial times in the U.S. as a means of formally accusing those who the jurors personally knew to be guilty. However, in the American colonies, grand juries also assumed the role of protecting innocent citizens from zealous prosecutors.[104]

The federal courts, 22 states, and the District of Columbia now require grand jury indictments in all cases.

The process is relatively simple. The prosecutor presents the evidence in a criminal case to the grand jury, and the grand jury decides whether there is enough evidence for the case to proceed. If the grand jury decides that it should go forward, it issues an indictment formally charging the defendant with the crime(s) alleged, and the criminal case begins. In this way, the indictment in a criminal case is akin to a complaint in a civil case.

But there are concerns about this process. The prosecutor presents the evidence without a judge present to control what evidence is presented, and how it is done. Also, the potential defendant is not present, nor is any lawyer representing the accused. Thus it can be argued that all too often grand juries are controlled by prosecutors. Because of the one-sided nature of grand jury proceedings, it is relatively easy for the prosecutor to obtain an indictment. As stated in a common aphorism that has been traced to the 1980s, under these circumstances it is possible for a zealous prosecutor to indict anyone, even a "ham sandwich."[105] On the other hand, the process has the advantage that it serves as a mechanism for filtering out criminal cases that have little merit.

A grand jury is also much larger than a trial jury (technically known as a *petit jury*)—typically with 16 to 23 members in federal cases and a similar number in state cases. The jurors are chosen from the same jury pool as trial jurors, but grand juries sit for more than one case. In the federal system, grand jurors may serve up to 18 months and can hear hundreds of potential cases during that time.

The presentation of evidence and the deliberations of grand juries are always conducted in secret, away from the scrutiny of the press and the public. The rationale is that witnesses will feel free to give their testimony without fear of revenge. But it could be argued that a witness is more likely to exaggerate or even lie if that person knows the testimony will not be subject to public scrutiny.

While the grand jury is in session, the grand jurors and the prosecutors are restricted from publicly disclosing any information about the proceedings. Witnesses are not permitted to talk with anyone except authorized officials until after they have given their testimony. But once a witness has testified in secret, he or she can, if willing to do so, talk freely about the testimony. Since the press is usually allowed to be outside the grand jury room to watch witnesses as they enter and leave, an enterprising reporter can be on the lookout for witnesses who volunteer to talk.

But it's important to remember that witnesses can talk, if they wish, only *after* their testimony. A journalist who publishes information from a witness before they testify, or information leaked by a grand juror or a prosecutor, faces the real possibility of a subpoena to identify the source in court or may face contempt of court charges that can result in a fine and/or a jail sentence.

After hearing the evidence in the forms of testimony and materials and/or documents, the grand jury votes to determine whether there is *probable cause* to believe that a person has committed a crime and thus should be tried. *Probable cause* is a relatively low standard. It simply means that there is more evidence as a whole for the grand jurors, acting as reasonably prudent individuals, to believe that the accused committed the crime than that the person did not. This is sometimes known as *reasonable cause* or *reasonable belief*. If the specified number of members (12 in the federal system) finds probable cause, the grand jury will issue a *bill of indictment*, also known as a *true bill*, charging the individual with a particular crime or crimes. Unless the indictments have been ordered sealed, which occurs in rare circumstances, they are read and made available in open court and then filed as open records, usually in the court clerk's office.

Filing of an Information

The second method by which criminal charges can be brought is *filing of an information* by a prosecutor. This is simply a process by which the individual is formally accused without the use of a grand jury. Constitutional standards, including the Sixth and Fourteenth Amendments, require that the exact (or approximate if exact cannot be determined) date, time and place of the alleged criminal act be specified in the information. The information must explain the role the defendant played in the alleged crime and other known details. The idea is that defendants should be sufficiently informed of the details of the case against them so that they can adequately defend themselves.

The filing of an information is often based on evidence obtained through one or more search warrants. Such a warrant must conform to Fourth Amendment standards enunciated by the U.S. Supreme Court in a series of complicated decisions over the years. Basically, the Court has said that a warrant must be specific and narrowly drawn to ensure that a constitutionally valid search is conducted. If a search warrant is improper, then the evidence garnered from the search generally cannot be used at trial, although the Supreme Court has carved out a series of "good faith exceptions" that some legal experts, especially criminal defense attorneys, find troubling.

As described in detail above, the U.S. Supreme Court has held that search warrants may be used to conduct search of newsrooms,[106] although federal law now generally requires investigators seeking information from the media to use the subpoena process, rather than obtaining a search warrant.[107]

One variation of the filing of an information occurs when charges are initiated by one individual filing a criminal complaint against another, such as a spouse filing charges against their partner for assault. In such cases, the criminal complaint basically serves as a request to the prosecutor to take further steps. The prosecutor can choose *not* to proceed further, especially if there appears to be no probable cause to do so.

Citations

Finally, for certain misdemeanors and other relatively minor crimes that are not felonies, charges can be brought via a *citation* from a law enforcement or other designated officer. No grand jury or filing of an information is required under these circumstances.

Arrest Warrant

Once a grand jury has returned an indictment or a prosecutor has filed an information, the court clerk issues an *arrest warrant* if the person is not already in custody. Since the 1966 U.S. Supreme Court decision in the case of *Miranda v. Arizona*,[108] police have been required, primarily under the Fifth Amendment ban on forced self-incrimination, to inform suspects in police custody of their constitutional rights *before* any questioning can begin. This is the famous soliloquy heard often on TV cop shows, which starts with, "You have the right to remain silent…"[109] If police fail to give the warnings when the rule is in effect, any confession or other incriminating evidence disclosed by that person generally may not be used to convict the person.

Preliminary Hearing

Unless a defendant has been indicted by a grand jury, the next major step in a criminal procedure is an *initial* or *first appearance*, which is known in some jurisdictions as a *preliminary hearing* or an *arraignment*. At this hearing, which is open to the public, the judge will inform defendants of the specific charges brought against them and then inform them of their legal rights. At this stage, a judge must also decide if there is *probable cause* (i.e., sufficient evidence) to warrant bringing defendants to trial. If the judge believes the evidence is insufficient, the judge will dismiss the charge(s) and order that the defendant be released.

If the judge finds probable cause to charge the defendant(s), the judge will then determine whether they need legal representation. If the defendants cannot afford an attorney, the judge will make arrangements for a public defender—paid for by the government—to serve that role. Finally, the judge determines whether defendants will be allowed to post bail and, if so, how much must be posted prior to their release from custody.

The judge has several options, including allowing defendants to post a specified amount for *bail*, releasing defendants on *their own recognizance* (without having to post bond), and even denying bail in extreme circumstances such as when a defendant has a history of or is likely to "jump" bail (not show up for subsequent hearings).

The rationale in granting bail is to allow the defendant to prepare adequately to defend the case while a stick is held over the accused's head in the form of a posted bail bond that is forfeited if the defendant fails to appear at trial. A judge does have the option of imposing certain conditions on the bail such as restricting the defendant's travel and personal contacts, so long as the restrictions are